Supreme Court of the United States

OCTOBER TERM, 1898.

Nos. 646, 647, 1900.

WILLIAM R. WILLCOX ET AL., constituting the Public Service Commission of the State of New York for the First District,

THE CITY OF NEW YORK and WILLIAM S. JAMES, as Attorney General of the State of New York,

vs.

CONSOLIDATED GAS COMPANY OF NEW YORK.

APPEALS FROM THE CIRCUIT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR APPELLEE,

upon special franchises and good will.

SHEARMAN & STERLING,
Solicitors for Appellee,
44 WALL STREET,
New York.

JOHN A. GARVER,
Of Counsel.

C. G. Henderson, 32 to 38 Spring Street, New York.

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Supreme Court of the United States.

OCTOBER TERM, 1908.

No. 396.

WILLIAM R. WILLCOX, *et al.*, constituting the Public Service Commission of the State of New York for the First District,

Appellants,

vs.

CONSOLIDATED GAS COMPANY OF NEW YORK.

No. 397.

THE CITY OF NEW YORK,

Appellant,

vs.

CONSOLIDATED GAS COMPANY OF NEW YORK.

No. 398.

WILLIAM S. JACKSON, as Attorney General of the State of New York,

Appellant,

vs.

CONSOLIDATED GAS COMPANY OF NEW YORK.

Brief for Appellee, upon special franchises and good will.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

Preliminary Statement.

The Special Master, who tried the issues of fact in this case, found that the reasonable value of all the property of the Gas Company devoted to the business of manufacturing and supplying gas was $83,357,000 (Record, p. 247). In this valuation, he included the sum of $20,000,000 as the reasonable value of the special franchises and good will of the Company, without attempting to apportion the value between those two items (Record, p. 247).

Upon the entire valuation of $83,357,000, the Special Master found that, at the rate of eighty cents per thousand cubic feet, the Gas Company would receive a return of only 2.8% (Record, p. 248). Even if the $20,000,000 allowed for the special franchises and good will were thrown out altogether, the return upon the remaining $63,357,000 would be only 3.6%. This would be equivalent to 6% on $38,788,805, thus leaving $24,569,000, upon which the Company would receive no return (Record, p. 248).

Upon the final hearing, the Court refused to allow anything for the good will of the business; but it held that two of the special franchises owned by the Company were worth *at least* $12,000,000 (Record, p. 431), deeming it unnecessary to pass expressly upon the findings of the Special Master as to the other franchises (Record, p. 432), though indirectly confirming such findings (Record, p. 430); and this sum was included in the total value of the property of the Company, upon which it was adjudged to be entitled to a return (Record, p. 432).

The special franchises of the Company (which included the mains and services in the streets) were assessed for the year 1906, for the purposes of taxation, at $31,900,000 (Record, p. 5291). The mains and services were valued at about $7,900,000 (Record, pp. 202, 1849, 5061), thus leaving for the intangible franchises, the sum of $24,000,000. The Chairman of the State Board of Assessors testified, without contradiction, that, in his opinion, the reasonable value of those franchises was $31,900,000 (Record, p. 1848), in which was in-

cluded about $7,900,000 for the value of the tangible property, consisting of the mains and house connections (Record, p. 1849).

The appellants assail the allowance of any sum for special franchises or good will, not only on the ground that the amount is excessive, but that the Company does not possess any special franchises and that, even if it did, such franchises cannot be included among the assets upon which the Company is entitled to a return.

The Company has its mains in every paved street in the Borough of Manhattan (Record, p. 566). Its total mileage, in 1905, exclusive of abandoned mains, was 822 miles (Record, p. 668), through which it furnished to its 390,000 consumers (Record, p. 1675) 13,283,163,767 cubic feet of gas (Compl. Ex. 94, Record, p. 5051).

POINTS.

PART I.

SPECIAL FRANCHISES MUST BE INCLUDED AMONG THE ASSETS UPON WHICH THE COMPANY IS ENTITLED TO A RETURN.

FIRST.

Unanimity of opinion in the lower Court as to special franchises.

That the special franchises of the Company should be included among its assets, upon which it is entitled to a return, was the opinion of the Circuit Judge (LACOMBE, J.), who granted the motion for a preliminary injunction (Record, p. 143); it was the opinion of the Special Master, who was appointed (Record, p. 199) on account of his peculiar qualifications, pursuant to the suggestion of this Court in Chicago, etc., Ry. Co. v. Tompkins (176 U. S., 167, 180), that "the most competent and reliable master" should be selected in a case of this kind; and it was also the conclusion of the District Judge before whom the case was tried. While the personal views of the learned District Judge were at variance with the conclusion which he reached, he nevertheless felt constrained to yield his own convictions to the weight of authority on the subject (Record, p. 414).

In regard to these special franchises, Judge LACOMBE said (p. 142):

> "The Commission reached the conclusion that the franchises, under which it has laid mains and is delivering gas and which are a part of its property, should be considered as of no value whatever, although the State, through the action of its taxing officers, has declared that they are worth several millions of dollars. It is suggested that some of these franchises have expired or lapsed in some way. That proposition need not be considered because it is not asserted that all of them have lapsed. The complainant has taken over the franchises of many different corporations

granted at different times. So long as a substantial part of these still remain, the argument is not affected, except as to details of result. The reason assigned by the Commission for not including the value of the franchises is that 'they were granted by the people without compensation.' That is so: these franchises were granted very many years ago at a time when there seems to have been no intelligent appreciation of the fact that they might become enormously valuable; when reckless improvidence was the rule and all sorts of franchises were given away without any provision for securing to the State its fair share of unearned increment thereon. Nevertheless, when the State offers a franchise to whomever will take it, without requiring any money return thereon, and for the sole consideration that the taker shall promptly, continuously and fully develop it by the expenditure of his own money, and such offer is accepted and the terms of the agreement carried out by the taker, there results a contract, which—with due consideration of all proper conditions and limitations inherent in the nature of the particular contract—is as much within the protection of the Constitution as are all other contracts. If the State, twenty-five or fifty years thereafter, should say to the taker: 'We were very improvident in not providing that you should pay us something each year for this franchise; therefore, hereafter you shall pay us eight per cent. annually on $10,000,000 or $20,000,000 or we will evict you from the franchise'—it might find itself embarrassed by the provisions of the Constitution in thus undertaking to avoid the results of its own improvidence.

"*A franchise*, whatever its value may be, which has not expired, nor lapsed, nor been in some way forfeited, *is property in the hands of its holder*. There is force in the argument that when the State says: 'We will value this property at several millions of dollars when we tax you on it, but at nothing at all when we fix the rate you may charge for your product in order to receive an eight per cent. return on your property'—it is seeking to accomplish by indirect methods what it might not be able to accomplish directly."

SECOND.

Meaning of the term, "special franchises."

At the outset, it should be clearly noted that the franchises which are in controversy in this case are not *corporate* franchises.

They are special rights or easements, which may be granted to individuals as well as to corporations. An instance of such a grant to individuals is contained in the present record. The Legislature of New York, in 1871, granted to Isaac P. Martin and others the right to make and sell gas and to lay pipes in the streets of New York, north of 79th Street (L. 1871, Ch. 944; Record, p. 5119).

As applied to a gas company and as used in this brief, the term "special franchises" signifies the right to occupy with its mains the streets of the municipality where it carries on its business, as distinguished from the corporate franchise and the general franchise to engage in the business of manufacturing and supplying gas.

People v. Tax Commissioners, 174 N. Y., 417, 435.

This distinction is frequently overlooked in the briefs filed by counsel for the appellants.

The special franchises which are involved in the case at bar are *the identical franchises* which were under consideration by this Court in the Special Franchise Tax Cases.

Metropolitan Street Ry. Co. v. New York, 199 U. S., 1; affirming 174 N. Y., 417;
Consolidated Gas Company v. New York, 199 U. S., 53.

THIRD.

Law of New York controls as to nature of special franchises.

This Court will accept as controlling the law of New York upon the question of the property rights that exist in special franchises. Whether the right to use the streets constitutes property in the full sense of the term, how that right may be acquired, its extent, duration, assignability, etc., are all questions which depend upon the law as it exists in the State of New York.

Ohio Oil Co. v. Indiana, 177 U. S., 190, 205, 207;
Muhlker v. Harlem Railroad Co., 197 U. S., 544;
Vicksburg v. Vicksburg Waterworks Co., 206 U.S, 496, 509.

In New York, it is the law, as declared by the Court of Appeals in the Elevated Railroad Cases, that the owner of property fronting on the streets of a city possesses easements of light, air and access, which are impaired by an elevated railroad structure in such streets. New York is almost alone in the recognition of this principle. Yet, in Muhlker v. Harlem Railroad Company (*supra*), this Court not only applied that doctrine to the Harlem viaduct in Fourth Avenue, but it went to the extent of reversing the New York Court of Appeals, which had held to the contrary, on the ground that the decision of the Court of Appeals was at variance with the previous decisions of that Court, under which it had been held that the principle of the Elevated Railroad Cases was applicable to the Harlem viaduct; and this Court decided that the New York Court of Appeals was not at liberty to ignore its previous decisions on the subject and thus impair the obligation of contracts entered into on the faith of those decisions. The Court of Appeals has since then recognized the binding force of the decision of this Court in the Muhlker case.

Sander v. New York, 182 N. Y., 400, 403.

FOURTH.

In New York, special franchises are property in the fullest sense.

I. That, in New York, special franchises are property, in every respect, is well settled.

Sixth Ave R. Co. v. Kerr, 72 N. Y., 330;
People v. O'Brien, 111 N. Y., 1, 40;
Suburban Rapid Transit Co. v. New York, 128 N. Y., 510, 520;
People *ex rel.* Woodhaven Gas Co. v. Deehan, 153 N. Y., 528, 532;

Parker v. Elmira, C. & N. R. Co., 165 N. Y., 274;
People v. Tax Commissioners, 174 N. Y., 417, 437;
Matter of White Plains Commissioners, 176 N. Y., 239;
Matter of Long Acre El. L. & P. Co., 188 N. Y., 361;
Hatfield v. Straus, 189 N. Y., 208, 219;
Coney Island etc. R. Co. v. Kennedy, 15 App. Div., 588, 592;
Rochester etc. Turnpike Road Co. v. Joel, 41 App. Div., 43, 45;
Wakefield v. Village of Theresa, 125 App. Div., 38.

1. In People v. O'Brien (*supra*), Chief Justice RUGER, who delivered the opinion of the Court, said, in referring to the Broadway Railroad franchise to construct a street railroad on Broadway (p. 40), that such franchises "have been uniformly regarded as indestructible by legislative authority and as *constituting property in the highest sense of the term.*"

In that case, a right to lay the tracks of a railroad in Broadway had been conferred upon the Broadway Surface Railroad Company. Before any tracks were laid, the Company mortgaged its property and franchises to secure an issue of bonds, which were duly purchased by investors. Subsequently, the charter was revoked by the Legislature. Held, that the right to amend or repeal did not give the Legislature the right to deprive the Company of its franchise to occupy the streets. On the part of the State, it was contended that a franchise of that kind was a mere license or privilege, enjoyable during the life of the grantee only and renewable at the will of the State. To that suggestion, the Court said (p. 41):

> "We believe this proposition to be not only repugnant to justice and reason, but contrary to the uniform course of authority in this country."

2. In Suburban Rapid Transit Co. v. New York (*supra*), where the right to construct its railroad over a certain highway had been conferred upon the Railroad Com-

pany, which, however, had not instituted any proceedings to acquire ownership of the right of way, it was held that this right could not be impaired by a subsequent statute appropriating the land for a public park. In the course of its opinion, the Court said (p. 520):

> "How can a franchise thus conferred by the legislature be deemed inchoate and defeasible? Is not its possession an element of the security upon which capital has been subscribed and loans have been made to the Company?"

And, referring to the special franchise in People v. O'Brien, the Court added:

> "The corporate franchise * * * was held by us to be a right indestructible by the legislature *and to constitute property in the highest sense of that term.*"

3. In the Woodhaven case (*supra*), the Court said, referring to the franchise of a gas company to occupy the streets of a municipality with its mains (p. 532):

> "Such a franchise is property that cannot be destroyed or taken from it or rendered useless by the arbitrary act of the village authorities in refusing the permit to place the conductors under the streets."

4. In Parker v. Elmira, C. & N. R. Co. (*supra*), the Court said (p. 280) that a franchise was "*entitled to the same protection from invasion as any other species of property.*"

5. In the Long Acre case (*supra*), the Court of Appeals has recently said (p. 366):

> "It cannot be disputed that a franchise to operate electrical conductors in the streets is property, taxable, alienable, subject to levy and sale under execution and to condemnation under the exercise of the power of eminent domain."

6. Still more recently (October, 1907), in Hatfield v. Straus (*supra*), the Court said, referring to a franchise giving the right to use the streets (p. 219):

"A franchise is property, assignable, taxable and transmissible";

and the Court made it very clear that a franchise was something much more substantial than a mere license, thus following the conclusion previously reached by the Court of Appeals.

Milhau v. Sharp, 27 N. Y., 611, 622;
People v. O'Brien, 111 N. Y., 1, 41;
Trustees of Southampton v. Jessup, 162 N. Y., 122, 126;

and also by this Court.

Monongahela Nav. Co. v. United States, 148 U. S., 312, 343–4.

7. In Wakefield v. Village of Theresa (125 App. Div., 38), the Court (all five Justices concurring) said (p. 42):

"In reliance upon the contract, the plaintiffs and their predecessors in interest expended money in erecting, extending and operating the plant, and the privilege granted to use the streets became *a valuable property right*, of which the owners cannot be deprived, unless there has been a forfeiture on their part, or unless the plant has become a nuisance."

II. That a special franchise, such as those under consideration in this case, is property, with all the attributes of property, is the law of nearly every State in the Union and has repeatedly been recognized in this Court.

West River Bridge Co. v. Dix, 6 How., 507, 534, 543;
Wilmington Railroad v. Reid, 13 Wall., 264;
Morgan v. Louisiana, 93 U. S., 217, 223;
New Orleans, etc., R. Co. v. Delamore, 114 U. S., 501;
Monongahela Nav. Co. v. U. S., 148 U. S., 312;
Detroit v. Detroit Citizens St. Ry. Co., 184 U. S., 368, 394;
Metropolitan St. Ry. Co. v. New York, 199 U. S., 1, 39.

"A large portion of the wealth of the community consists of intangible property."

Adams Express Co. v. Ohio, 166 U. S., 185, 218–19;
Metropolitan St. Ry. Co. v. New York, 199 U. S., 1, 39.

Even the value of the tangible property of public service corporations depends largely upon the special franchises owned by such corporations. Without such franchises, the right of way or tracks of a railway company would possess only a nominal value, and the pipes and mains of a gas company would be mere junk for the scrap heap.

People v. New York, 174 N. Y., 417, 437, 441;
State Railroad Tax Cases, 92 U. S., 575, 606.

In the Court below, the learned counsel for the Attorney General (Hon. David B. Hill), in referring in his brief (p. 27) to the statement contained in the opinion of Judge LACOMBE (*ante*, p. 5), that "a franchise * * * is property in the hands of its holder," made this unqualified concession:

"*No one doubts the latter proposition.*"

Not so laconic was the utterance on this point of the Attorney General of New York, in the Franchise Tax Cases (the very last cases coming to this Court from New York, in which the nature of special franchises was under consideration), in which the State of New York was contending that they were property of the most valuable kind. In the report of that case (199 U. S., 1, 25-26, 53), the following admirable summary of the nature and attributes of such franchises was made in the brief submitted by the Attorney General and his able associate:

> "These special franchises have all of the attributes of property. They are vendible and transferable. They cannot be taken away, even under the power of eminent domain, without due compensation. They may be leased or mortgaged. *They survive the existence of the corporation upon which they are bestowed.* They are the life and soul of the tangible property to which they appertain. They bestow an earning capacity upon physical properties, which, without them, would corrode and decay, and be utterly useless. While the tangible property employed for the utilization of the intangible franchise is destructible, the latter is indestructible. While the former requires renewal and reparation, the latter does not; and, yet, the two are inseparable, and together constitute a species of property, the aggregate of

> which, in the United States, is valued in the exchanges of the country at figures which almost paralyze the imagination."

In his Brief now filed in this Court, the Attorney General makes substantially the same admission (*post*, p. 56); and this is also conceded in the Briefs filed by counsel for the other appellants (*post*, pp. 62, 68).

As long ago as the Dartmouth College case, Mr. Justice STORY said (4 Wheat., 518, 684) that "a grant of a franchise is not, in point of principle, distinguishable from a grant of *any other property*."

FIFTH.

In New York, special franchises cannot be repealed or impaired, under the reserved power.

While, under the reserved power, the legislature may revoke the corporate and general franchises of a corporation, it cannot, in New York, by repealing the charter, annul or impair its special franchises.

People v. O'Brien, 111 N. Y., 1, 36, 37.

SIXTH.

Special franchises are easements or interests in real property.

When authority is given by the State to a corporation to use the streets of a municipality and the franchise has been accepted and acted upon by the corporation, a contract has been made which, during its continuance, cannot subsequently be impaired by the legislature.

People v. Sturtevant, 9 N. Y., 263, 273;
Milhau v. Sharp, 27 N. Y., 611, 620, 622;

New Orleans Gas Co. v. Louisiana Light Co., 115 U. S., 650, 660;
New Orleans Water Works v. Rivers, 115 U. S., 674, 681.

But the contract thus entered into for the use of the streets is something more than a mere personal right. It is a grant of an incorporeal hereditament; it is an easement or right of way in the streets, and hence is real property.

Milhau v. Sharp, 27 N. Y., 611, 620–1;
People v. O'Brien, 111 N. Y., 1, 40, 55;
Ghee v. Northern Union Gas Co., 158 N. Y., 510, 513;
People v. Tax Commissioners, 174 N. Y., 417, 435–6;
Matter of White Plains Commissioners, 176 N. Y., 239, 249;
Kronsbein v. Rochester, 76 App. Div., 494;
Matter of East River Gas Co., 122 App. Div., 890;
Bowman v. Watham, 2 McLean, 376;
Detroit Citizens' Street Ry. Co. v. Detroit, 64 Fed. Rep., 628, 643, 644, 646 (C. C. A.);
West River Bridge Co. v. Dix, 6 How., 507, 534;
Gue v. Tide Water Canal Co., 24 How., 257;
East Alabama Ry. Co. v. Taggart, 114 U. S., 340, 353.

1. In Milhau v. Sharp, the Court, in referring to a franchise to use the streets for a surface railroad, said, by SELDEN, J. (p. 620):

> "It amounted also to an immediate grant of an interest, and, it would seem, of a freehold interest in the soil of the streets to the defendants. The rails, when laid, would become a part of the real estate, and the exclusive right to maintain them perpetually is vested in the defendants, their successors and assigns."

2. In People v. O'Brien, in referring to the Broadway Railroad franchise, the Court said (p. 40):

> "We are, therefore, of the opinion that the Broadway Surface Railroad Company took an estate in perpetuity in Broadway, through its grant from the City under the authority of the Constitution and the Act of the Legislature;"

and it also added (p. 55):

> "We are, therefore, of the opinion that the Broadway Surface Company took an indefeasible title to the land necessary to enable it to construct and maintain a street railroad in Broadway and to run cars thereon for the transportation of freight and passengers, which survived its dissolution."

3. In Ghee v. Northern Union Gas Co., the Court, in the course of its opinion, which was written by PARKER, C. J., in referring to the street franchise of a gas company, said (p. 513):

> "It operates to create a franchise, by which is vested in the corporation receiving it *a perpetual and indefeasible interest in the land constituting the streets of a municipality.*"

4. In the Franchise Tax Cases (174 N. Y., 419, 435), the Court referred to a special franchise as a "*right of way over a public street.*"

5. In the Matter of White Plains Commissioners, the Court referred to the franchise of a water company to use the streets of a municipality as "a perfect *grant*" (p. 249).

6. In Kronsbein v. Rochester, the New York Appellate Division (five Justices) unanimously decided that the special franchises of corporations appearing upon the assessment rolls, pursuant to Chapter 712 of the Laws of 1899 (the Special Franchise Tax Law), are to be considered as part of the assessable real estate of the city, in ascertaining the amount of the real property upon which the debt limit is computed, *within the meaning of the State Constitution*, which limits the power of a municipality in contracting debts, to ten per cent. of the assessed value of the real estate. In the course of its opinion, the Court said (p. 501):

> "It is to be observed that the Legislature did no violence to the settled principles of the law in designating these franchises as real property. They are inseparably connected with real estate and appurtenant to it, like a fixture or an incorporeal hereditament, and the

exercise of the privilege requires a disturbance of the soil of the physical body of the land. The statutory definition runs in harmony with that of the common law."

6. The Matter of the East River Gas Company is not reported in full. That was the unanimous decision of the Appellate Division of the First Department (five Justices), in a proceeding instituted to perpetuate the testimony of a witness, pursuant to Sections 1688*a* and 1688*i* of the New York Code of Civil Procedure, which provide a system for perpetuating testimony upon a matter "involving a question as to title to *real property* in the State of New York." The testimony which it was desired to perpetuate was with reference to the assignment of a street franchise from one gas company to another. The application was opposed by the City of New York, on various grounds, including the ground that the special franchise was not real property. The Supreme Court, in granting the application, and the Appellate Division in affirming the order, thus necessarily passed directly upon the point that the special franchise of a gas company is real property.

II. The same conclusion has been reached in other States, where the question has arisen.

Chicago v. Baer, 41 Ill., 406;
Stockton Gas Co. v. San Joaquin County, 148 Cal., 313.

III. That a franchise of this kind is real property was decided in England, in the early days of gas lighting.

Rex v. Brighton Gas Light Co., 5 B. & C., 466.

IV. Counsel for the Public Service Commission concede, in their Brief, that these franchises are "incorporeal real property" (*post*, p. 62).

SEVENTH.

A corporation cannot be deprived of its special franchises, except under the power of eminent domain and upon payment of their full value.

That a corporation cannot be deprived of its special franchises, in condemnation proceedings, without just compensation, is now the firmly established law.

Sixth Ave. R. Co. v. Kerr, 72 N. Y., 330;
Matter of White Plains Commissioners, 176 N. Y., 239;
Coney Island etc. R. Co. v. Kennedy, 15 App. Div., 588, 592;
Spring Valley Water Works v. San Francisco, 124 Fed., 574;
Monongahela Nav. Co. v. U. S., 148 U. S., 312.

I. In the Matter of White Plains Commissioners, the Village of White Plains instituted proceedings to condemn the property of a water works company. The Commissioners did not allow anything for the special franchise and good will of the company, on the ground that, in the contract between the village and the company, the village had expressly consented to the franchise only on condition that it should have the right to purchase the property at the expiration of any period of five years, and that the special franchise and good will therefore had only a nominal value. The Court of Appeals reversed the order confirming the award and held that the village authorities had no power to impose such a condition, that the condition was consequently void, although expressly assented to by the company, and that the village should pay the company the full value of all its property, "*including its good will and franchise*" (p. 252).

II. In the Monongahela Navigation Company case, this Court, after a very careful consideration of the nature of a special franchise, reached the conclusion that even under its unlimited power

to regulate commerce, Congress could not appropriate property in a navigable stream, without paying to the owner not only the value of the tangible property but also that of the special franchise under which the tangible property was operated. Congress had passed an Act, authorizing the United States to acquire by condemnation proceedings a lock and dam, constructed by the Navigation Company pursuant to authority derived from the State of Pennsylvania, which had authorized the Company to collect tolls for the use of the lock. A provision was inserted in the Act of Congress, that, in estimating the sum to be paid, nothing should be allowed for the franchise to collect tolls. The Attorney General attempted to sustain this provision under the commerce clause of the Constitution; and he urged that, as Congress had the absolute power to regulate commerce, the right to take tolls must necessarily have been granted by the State and accepted by the Company subject to this superior power of regulation. This argument was pressed with great confidence, in reliance upon the undisputed power of Congress to direct the removal of any obstruction to commerce, without compensating the owner. But this Court held that even the unlimited power to regulate commerce would not authorize the Federal Government to destroy a franchise of this kind without making just compensation for it; and it has since then reiterated the conclusion thus reached.

United States v. Bellingham Bay Boom Co., 176 U. S., 211, 216.

Counsel for the Public Service Commission contend that the Monongahela case is not in point, because the franchise in that case had a conceded value, by reason of its including a right to take tolls up to an amount securing an 8% dividend upon the capital stock of the corporation, and also because the franchise could not be ignored by the United States, although it might possibly have been ignored by the State, under its reserved power. It is not, however, a question of how much value a franchise may have, but whether it has any value. This will necessarily vary with each

case; and that there are various elements of value was expressly recognized in the Monongahela case (p. 328). In New York the reserved power does not include the right to disregard a special franchise (*ante*, p. 12).

III. Half a century ago, this Court was urged to make a distinction, in condemnation proceedings, between tangible and intangible property, just as it is urged to do so in the present case.

West River Bridge Co. v. Dix, 6 How., 507.

In that case, a bridge company had erected a bridge, under a franchise granting it that right and the right to take tolls. Subsequently, the town authorities laid out a highway, which included this bridge; and proceedings were instituted to acquire the property and franchises of the bridge company for that purpose. An award was made, which included the franchises. The bridge company contended that its franchise to take tolls was a special kind of property, more sacred than mere corporeal property, and that it could not be appropriated under the exercise of the power of eminent domain, as it was a contract which could not be impaired, owing to the prohibition of Section 10 of the first Article of the Constitution. To this, the Court answered (p. 534):

> "We are aware of nothing peculiar to a franchise which can class it higher or render it more sacred than other property. A franchise is property, and nothing more; it is incorporeal property, and is so defined by Justice BLACKSTONE, when treating in his second volume, c. 3, p. 20, of the Rights of Things. It is its character of property only which imparts to it value and alone authorizes in individuals a right of action for invasions or disturbances of its enjoyment."

As to the distinction between corporeal and incorporeal property, the Court said (p. 534):

> "A distinction has been attempted, in argument, between the power of a government to appropriate for public uses property which is corporeal, or may be said to be in being, and the like power in the government to resume or extinguish

a franchise. *The distinction, thus attempted, we regard as a refinement, which has no foundation in reason.*"

This language was quoted with approval in Long Island Water Supply Co. v. Brooklyn (166 U. S., 685, 693).

EIGHTH.

Special franchises cannot be taken or disregarded under the power to regulate rates.

I. If special franchises are "entitled to the same protection from invasion as any other species of property" (165 N. Y., 274, 280), and if a corporation cannot be deprived of its special franchises except under the exercise of the power of eminent domain and upon payment of their full value, it necessarily follows that a corporation cannot be deprived of its special franchises indirectly, through the exercise of the legislative power of regulating rates; for, as this Court observed, in the Railroad Commission Cases (116 U. S. 303, 331), the power to regulate rates "*amounts to a taking of private property for public use.*"

If, in the exercise of the sovereign power of eminent domain, a power which is essential to the very existence of government, a special franchise cannot be taken without making just compensation for it, and if, in the exercise of the great constitutional power to regulate commerce, a special franchise cannot be ignored, it is not possible that such franchises may be disregarded in the exercise of the power to regulate rates, a power the extent of which has not yet been satisfactorily determined. The power of a state legislature to regulate the rates of a public service corporation is inferior to the power to direct changes in the tangible structures of a public service corporation (Atlantic Coast Line v. N. Car. Corp. Com'n, 206 U. S., 1) and is insignificant compared with the vast power expressly conferred upon Congress to regulate commerce between the

States, before the exercise of which, State legislatures stand powerless. On what possible ground can it be contended that this comparatively subordinate power of a State legislature to regulate rates, can rise superior to property rights, which must be respected even in the exercise of the unlimited power of Congress to regulate commerce ?

The contention is advanced in the present case that the special franchises of a public service corporation are granted upon the implied condition that they are subject to the right of the legislature to regulate rates and, therefore, that the effect upon the value of such franchises may be ignored in such regulation. That was also the contention in the Monongahela case ; but this Court held that no legislature could ignore the mandatory prohibition of the Federal Constitution and that even the power to regulate commerce was subject to the prohibition against taking private property for public use without just compensation. The power of a State to regulate rates is necessarily limited to the extent that such regulation shall not impair the obligation of contracts, nor deprive a person of his property without due process of law, nor deprive him of the equal protection of the laws.

If the City of New York should decide to go into the lighting business upon its own account and to supply light to its inhabitants, and if power to acquire the properties of the existing lighting companies were conferred upon it, and if it exercised that power, it would have to pay for the special franchises, in condemnation proceedings, as well as for the tangible property taken. In other words, it would start out with a capitalization which would include the value of the special franchises of the existing companies ; and it would have to charge a sufficient price for its gas to obtain a return upon the amount paid for the franchises ; otherwise, it would lose money in the undertaking and would be forced to collect by general taxes what it had not received in the price of gas.

II. If, in the regulation of rates, the value of the special franchises could be disregarded, an easy method would be afforded of

accomplishing indirectly what could not possibly be done directly. Because, if it were desired to give the City power to acquire the properties of the existing gas companies, without paying for the special franchises, all that would be necessary to do would be, first, for the legislature, or the City (if it had the express power), to regulate the rates, so as to permit a return only upon the value of the tangible property and thus eliminate largely the value of the special franchises, and, having done that, to acquire the property of the gas companies in condemnation proceedings, including the special franchises, which could thus be obtained at a nominal valuation. The Attorney General, in his Brief filed in this Court (p. 6), seems to approve of such a course; but its iniquity was pointed out in the opinion of Judge HOUGH, in the Court below (Record, p. 414); and it was also alluded to by this Court, in the Monongahela case (148 U. S., 312, 337):

> "It would seem strange that if, by asserting its right to take the property, the government could strip it largely of its value, destroying all that value which comes from the receipt of tolls, and having taken the property at this reduced valuation, immediately possess and enjoy all the profits from the collection of the same tolls."

In Knoxville Water Works Co. v. Knoxville (189 U. S., 434), the Court said (p. 438) that "an attempt to affect the price of the company's plant in that way (by the regulation of rates), if the City should elect to purchase, would not be allowed to succeed."

III. The right of the legislature to regulate rates is based upon the principle that the patrons of a business affected with a public interest are entitled to all the benefits derived from the business, over and above a reasonable return upon the value of the property employed. In other words, such patrons virtually become partners in the enterprise. They stand in the position of holders of deferred shares, who are entitled to all the profits of the business in excess of a fixed return upon the value of the common property. Accordingly, to ignore the special franchises as to those who had actually

invested their capital in the enterprise and made it profitable, would be to bestow those franchises exclusively upon the holders of these deferred shares, who had not contributed any capital to the common venture.

It is sought to conceal the injustice of such a result, by asserting, in general and vague language, the right of the "public" to the franchises, on the ground that those franchises belong to the public and should never have been parted with without compensation. As a matter of fact, if the actual shareholders were deprived of all return upon the value of the special franchises, the general public would not get the benefit of the return on such franchises, but such benefit would be enjoyed only by that very small and limited portion of the public which happened to patronize the particular company owning the franchises.

IV. While the point has not been directly passed upon by this Court, yet, wherever it has been referred to in the general discussion of the subject of rate regulation, it has been stated or assumed that, in fixing a rate, the value of the special franchises must be included in valuing the property of a public service corporation.

Smyth v. Ames, 169 U. S., 466;
Reagan v. Farmers L. & T. Co., 154 U. S., 362;
Chicago etc. Ry. Co. v. Tompkins, 176 U. S., 167;
Detroit v. Detroit Citizens St. Ry. Co., 184 U. S., 368.

1. In Reagan v. Farmers L. & T. Co., the Court said (p. 410):

> "If the State were to seek to acquire the title to these roads, under its power of eminent domain, is there any doubt that constitutional provisions would require the payment to the corporation of just compensation; that compensation being the value of the property as it stood in the markets of the world and not as prescribed by an act of the legislature? Is it any less a departure from the obligations of justice to seek to take not the title but the use for the public benefit, at less than its market value?"

2. In Smyth v. Ames, the Court, in considering the method of ascertaining the value of the property, employed language which necessarily included special franchises, stating (p. 547) that there should be included "the amount and market value of its bonds and stock, . . . the probable earning capacity of the property"; and the meaning of this language is made clear by reference to the language previously used (p. 544):

> "The apparent value of the property *and franchises* used by the corporation, as represented by its stocks, bonds and obligations, is not alone to be considered when determining the rates that may be reasonably charged".

3. In Chicago etc. Ry. Co. v. Tompkins, the Court said (p. 173):

> "It is within the competency of the legislature to determine when and what property should be taken for public uses. The question is one of policy over which the Courts have no supervision; but if after determining that certain property shall be taken for public uses, the legislature proceeds further and declares that only a certain price should be paid for it, then the owner may challenge the validity of that part of the act, may contend that his property is taken without due compensation; and the legislative determination of value does not preclude an investigation in the proper judicial tribunals. *The same principle applies, when vested rights of property are disturbed by legislative enactment in respect to rates.*"

4. Detroit v. Detroit Citizens Street Railway Company holds that the legislature is precluded from exercising its power to regulate the rates of a corporation, which will interfere with a maximum rate previously agreed upon. If that is so, as to a contract price, it must be so with respect to the general principle that no rate can be fixed which precludes a reasonable return upon the value of *all* the property.

There is a marked difference between the exercise of the police power in the regulation of rates and its exercise where the public health, safety or morals are concerned.

The regulation of rates is an exercise of the police power.

People v. Budd, 117 N. Y., 1;
Budd v. New York, 143 U. S., 517, 544-5.

In all cases involving the public health, safety or morals, the exercise of the police power is paramount to property or contract rights. All property is held subject to the exercise of that power; and the owner has no remedy, if, as a result, his contract rights are changed or the value of his property is impaired.

Butchers Union Co. v. Crescent City Co., 111 U. S., 746, 750-1;
New Orleans Gas Co. v. Louisiana Light Co., 115 U. S., 650, 668-673;
New Orleans Gas Light Co. v. Drainage Commission, 197 U. S., 453;
Chicago etc. Ry. Co. v. Illinois, 200 U. S., 561;
Northern Pacific Ry. Co. v. Duluth, 208 U. S., 583, 596.

But that principle is not recognized in the regulation of rates; and contract and property rights cannot be ignored in such cases. A contract for a specific rate will be protected.

Detroit v. Detroit Citizens St. Ry. Co., 184 U. S., 368;
Cleveland v. Cleveland City Ry. Co., 194 U. S., 517, 536;
Vicksburg v. Vicksburg Water Works Co., 206 U. S. 496, 508, 515-6.

All the decisions of this Court, in the rate regulation cases, are based upon the proposition that the legislature cannot ignore property or contract rights in establishing a rate. A rate must be allowed which will permit a reasonable return upon the fair value of the property devoted to the public use.

San Diego Land Co. v. National City, 174 U. S., 739, 753-6.

V. In the lower Federal courts and in the State courts, wherever the point has been suggested, the conclusion has also been

reached or intimated, that special franchises cannot be ignored, in fixing rates.

Ames v. Union Pacific Ry. Co., 64 Fed. Rep., 165, 176;
Spring Valley Water Works v. San Francisco, 124 Fed. Rep., 574;
San Diego Water Co. v. San Diego, 118 Cal., 556.

1. In Ames v. Union Pacific Ry. Co., Mr. Justice BREWER expressly referred to the stronger reason which exists for allowing for the value of franchises in the case of rate regulation than in condemnation proceedings, saying (p. 178):

> "Is there not an element of equity which puts the reduction of rates in a different attitude from the absolute taking of the property by virtue of eminent domain? In the latter case, while only the value is paid, yet that value is actually paid, and the owners may reinvest and take the chances of gain elsewhere, whereas, if the property is not taken, the owners have no other recourse than to receive the sum which the property they must continue to own will earn under the reduced rates."

2. In Spring Valley Water Works v. San Francisco, Judge MORROW expressly included the franchises in the property of the company, which he valued for the purpose of ascertaining the return permitted by the rate. In referring to the Monongahela case, he said (p. 594):

> "It is true this was a condemnation proceeding, and the question was to determine what was just compensation for the appropriation of corporate property to a public use, while the case before this Court relates to the fixing of water rates which shall be a just compensation for the appropriation of complainant's property to a public use. It is not perceived that there is any difference in the principles applicable to the two cases; and this appears to have been the view of the Supreme Court in San Diego Water Co. v. San Diego, *supra*."

3. In the San Diego case, the Court said, with reference to fixing a maximum rate (p. 567):

> "The question what is just compensation in such a case is, *in all respects*, analogous to the question which arises *in every case* of appropriation under the power of eminent domain."

NINTH.

Gross injustice of disregarding value of special franchises in rate regulation cases.

Throughout the country, these special franchises have been capitalized with the sanction of the state authorities; and millions of dollars have, accordingly, been invested in the stocks and bonds of public service corporations, both here and abroad, the principal security of which are the special franchises of those corporations. To hold that such franchises can now be absolutely ignored in the regulation of rates and that rates may be reduced to a point which will permit a return only upon the value of the tangible property would be to set the seal of sovereign approval upon wholesale repudiation and to favor particular classes of the community (in the case of a gas company, its consumers) at the expense of the investing classes, to whose contributions all public utilities owe their existence and their value.

TENTH.

Special considerations affecting the question in New York.

In addition to the fact that these franchises are regarded as "property in the highest sense", in New York (People v. O'Brien, 111 N. Y., 1, 40), there are some special considerations which would make it peculiarly flagrant for the Legislature of that State to disregard them, in establishing a maximum rate for a public service corporation, and particularly for the appellee.

I. *Assessment for taxation.*

In New York, special franchises are assessed for the purposes of taxation, under a special statute passed for that purpose.

L. 1899, Ch. 412.

As the Court of Appeals observed, in construing that statute, its effect was to subject to taxation "property scattered all over the State, worth nearly two hundred millions of dollars".

People v. Tax Commissioners, 174 N. Y., 417, 437.

Under the authority thus conferred, the State of New York assessed the special franchises of the Consolidated Gas Company for the year 1906, at $31,900,000, which included about $7,900,000 for the tangible property (the mains and connections) and $24,000,000 for the franchises to occupy the streets (Record, pp. 202, 1849, 5061). That valuation was placed upon these franchises by the State Board, a body whose exceptional skill, in the opinion of the Court of Appeals, justified the disregard of the home rule principle in the State Constitution, in the appointment of a state board to value local franchises.

People v. Tax Commissioners, 174 N. Y., 417, 437-8.

Can the Legislature of the State of New York say to this Gas Company: "We will value your special franchises at the sum of $24,000,000 for the purposes of taxation, as measuring your obligation to contribute to the support of the government; but we will place only a nominal valuation upon them in determining the price which you may charge to your consumers"? And would it be any justification for such Janus-like action by the State, if it made the magnanimous concession suggested by appellants' counsel, that the tax paid should be allowed as an operating expense in ascertaining the net receipts of the business? On "concessions" of that kind, it would be entirely proper to deprive the Company of all return upon the value of its real estate, by permitting it to treat the tax levied upon such real estate as an operating expense. That kind of logic would lead to the conclusion that a public service corporation should be content to serve the public gratuitously, if the legislature should benevolently concede to it the right to pay its taxes out of the operations of the business.

The appellants contend that the taxation of special franchises does not prove that they constitute property, because, under the

Tax Law, not only is a franchise taxable, but also the "authority or permission" to maintain mains. But the "authority or permission" to maintain mains is a franchise. The existence of a franchise does not depend upon the extent of its duration; and permission to occupy the streets for one year is just as much a franchise and property right (irrespective of its value) as permission to do so for thirty years, or perpetually. A lease, for a year, of a city lot, no matter how small, is property just as much as ownership of the fee of an entire block.

II. *Express recognition of right in New York to capitalize special franchises.*

The Public Service Commissions Law of New York (L. 1907, Ch. 429, Secs. 55, 69), by which the power to regulate rates has been conferred upon a Commission, provides that "the commission shall have no power to authorize the capitalization of any franchise to be a corporation, or to authorize the capitalization of any franchise or the right to own, operate or enjoy any franchise whatsoever in excess of the amount (exclusive of any tax or annual charge) actually paid to the State or to a political subdivision thereof, as the consideration for the grant of such franchise or right."

This provision is significant, for two reasons: first, because, in prohibiting the capitalization of franchises for the future, except where they are actually paid for, the validity of the previous capitalization of franchises is impliedly conceded; and, second, because a corporation may even now capitalize its franchises to the extent of the amount paid for them. In other words, it is to-day the declared policy of the State to permit the capitalization of such franchises; and, consequently, they must be taken into consideration in the regulation of rates. But, in the absence of legislative prohibition or limitation, it cannot make the slightest difference what consideration was given for the franchises, whether it was in the form of a cash payment or the expenditure of capital in reliance upon a contract with the State. This question

of the consideration will be referred to again (*post*, p. 37), in considering the unfounded contention of the appellants, that no return should be permitted upon the special franchises, because nothing was paid for them.

III. *Capitalization of special franchises expressly sanctioned in 1884.*

While it is clear on principle that, in New York, special franchises must be included in any valuation of the property of a public service corporation in the regulation of rates and while that is a principle which can be invoked by the other New York gas companies mentioned in the record, which are affected by the legislation assailed in this case, there is a special fact in the history of the appellee which is decisive on this appeal.

The Consolidated Gas Company was organized in November, 1884, by the consolidation of six gas companies, which, at that time, were in active operation in New York City: the New York, the Manhattan, the Metropolitan, the Harlem, the Municipal and the Knickerbocker (Record, p. 4819). The new Company was capitalized at $39,078,000, in which was included $7,781,000 for the intangible property, including the special franchises (Record, pp. 5325, 5340). This consolidation was made in accordance with a statute which permitted the consolidation of the property *and franchises* of manufacturing corporations (L. 1884, Ch. 367).

Section 5 of that Act was as follows:

> "Upon the consolidation of the said corporations, and the organization of such new company, as hereinbefore prescribed, all and singular the rights, privileges, *franchises*, and interests of every kind belonging to or enjoyed by the said several corporations so consolidated, and every species of property, real, personal and mixed, and things in action thereunto belonging, mentioned in said agreement of consolidation, shall be deemed to be transferred to and vested in and may be enjoyed by such new corporation, without any other deed or transfer; and such new corporation shall hold and enjoy the same, and all rights of property, privileges, *franchises* and interests in the same manner and to the same extent, as if the said several companies so consolidated had continued to retain the title and transact the business of

> such corporations, and the title to real and personal estate, and rights and privileges acquired and enjoyed by either of the said corporations shall not be deemed to revert or be impaired by such act of consolidation, or anything relating thereto."

Section 1 of the Act provided that the agreement of consolidation should specify the amount of the capital, "*which capital shall not be larger in amount than the fair aggregate value of the property, franchises and rights of the several companies thus to be consolidated.*"

In 1885, a Committee was appointed by the Senate to investigate this consolidation, as the result of charges made that there was an over-capitalization (Record, p. 5325). A large amount of evidence was taken; and, as a result of the investigation, a report was made, sustaining the capitalization (Record, pp. 5382–8). With respect to the valuation of $7,781,000 placed upon the franchises, the report expressly called attention to the injustice of permitting the franchises to be capitalized, as the legislature would thus, in effect, make it inevitable that "the consumers of gas should be required to pay such a price for it as would pay a dividend upon the value of these franchises" (Record, p. 5385). After referring to the fact that about *one-sixth* of the entire capital stock had even then passed into the hands of innocent purchasers (Record, p. 5387) and that the franchises of only four of the Companies were worth *much more* than the sum of $7,781,000, at which the franchises of all six Companies had been capitalized (Record, p. 5386), the majority of the Committee said (Record, p. 5387):

> "Nothing but the clearest proof of fraud and violation of the law, by virtue of which it was issued, would justify any attempt to render such stock worthless. We are compelled to say that we have not been able to find such proof. If injustice has been done to the gas consumers of New York City, it has been done by the legislature passing a law allowing consolidations to be effected in this manner. These companies did simply what the law expressly said they might do."

Few issues of stock have been subjected to a more rigid scrutiny than that made by the Legislative Committee in the case of

this Company, when the facts were still fresh and when complete and accurate proof was readily obtainable. The validity of that issue was thus investigated under the most exacting conditions and in the most public manner; and the right of this stock to a return can no more be questioned than the right of any other share of stock of the Company.

If one sixth of the capital stock of the Company had passed into the hands of innocent purchasers within a little more than a year after the consolidation, there can be little doubt that substantially all the stock now held by nearly five thousand investors (Record, p. 760) has, during the quarter of a century that has since elapsed, been purchased on the faith of this legislative recognition, that the stockholders of the Company were properly entitled to a return upon the value of the franchises. It is, of course, impossible, at this late date, to set apart specific stock, of the par value of $7,781,000, and say that it alone of the entire capital stock is entitled to a return. The capitalization of the franchises enters into the value of every share; and it does not now make the slightest difference at what sum the franchises were then valued. Having been capitalized with the sanction and approval of the legislature, the Company is entitled to a return upon their present value, whatever that may be. The capitalization of the franchises is a fact just as substantial and firmly based as the contract in the Detroit Street Railroad case (Detroit v. Detroit Citizens St. Ry. Co., 184 U. S., 368), where this Court held that, in the regulation of rates, the City of Detroit could not disregard a thirty year contract, which had been made with the Company, permitting it to charge five cent fares. The only difference between the two cases is that, in the Detroit case, the exact return had been definitely fixed by agreement of the parties, while, in the case at bar, it is determined or fixed by law.

In the Broadway Railroad Case (People v. O'Brien, 111 N. Y., 1), the special franchises of the Company had been mortgaged before the road was constructed. The Legislature subsequently repealed the charter of the Company and terminated its existence;

but it was held that the Legislature had no right to do an act which would work an injustice upon the persons who had purchased the mortgage bonds of the Company. What the Court said in that case would apply with much greater force to the facts of the present case, in view of the express legislative recognition of the act of the Company, a quarter of a century ago, and the vast number of purchases and sales of the stock of the Company that have necessarily taken place since then (p. 53):

> "Creditors, contractors and stockholders had a right to rely upon the promise of the state, that the annulment of the corporate charter should not affect the remedies existing in their favor against the corporation, and this promise is a contract protected by the provisions of the Federal Constitution."

In the Court below, counsel for the Attorney General attempted to avoid this awkward fact, by claiming that the appellee was not a corporation at all, because, under the Consolidation Act of 1884 (L. 1884, Ch. 367), only manufacturing corporations could consolidate, and gas companies were not manufacturing corporations, and, therefore, the consolidation of 1884 was a nullity. Such a fanciful contention would never have been advanced, had it not been considered absolutely necessary to escape from the effect of the consolidation in the capitalization of the franchises. But it is a singular argument for the Attorney General to advance. For if there was any merit in the contention, the many illustrious predecessors of the present incumbent of that office were strangely remiss in their official duty, in allowing the years to slip by without trying to have the existence of this great corporation declared a nullity. And after all these years of acquiescence and especially after the legislative investigation, when the Act was still fresh on the statute book and the Legislature must be assumed to have known what corporations were intended to be included in the statute, and thousands of innocent investors have been led to purchase the stock, it is little short of flippancy to advance an argument so trivial and so inequitable. This is especially true, in view of the fact that gas companies are undoubtedly

manufacturing companies and have been held to be such, even under tax statutes, which must, of course, be strictly construed.

Nassau Gas Light Co. v. Brooklyn, 89 N. Y., 409.

That the organization of the appellee by the consolidation of 1884 was lega' and valid was the affirmative contention of the present Attorney General, in a recent application made by him to the Supreme Court of New York, for leave to bring an action to have the corporate existence of the appellee annulled, on the ground that it was exercising franchises which it did not possess. That application was denied, and the Company was recognized as having a valid existence by the Appellate Division of the Supreme Court (five Justices concurring).

Matter of Consolidated Gas Co., 124 App. Div., 401.

The contention that the consolidation was not duly made, in 1884, has been abandoned by the Attorney General in his brief submitted to this Court.

ELEVENTH.

The principle involved in the regulation of rates.

I. Much of the apparent difficulty in the discussion of this subject is due to the failure to recognize the essential principle which is involved in the regulation of rates and which has been lost sight of to some extent in the complexity of the facts to which such cases give rise.

The right to regulate rates has recently become a subject of such conspicuous importance, that it is naturally inferred that the regulation of rates is a matter of recent origin. But rate regulation is merely the enforcement of a principle which has long been recognized at common law and which has been the subject of legislation from the earliest days of parliamentary history. This principle is,

that a business which, as Lord HALE long ago expressed it, is "affected with a public interest," by reason of the fact that the public are compelled to patronize it, must make a reasonable charge for its services or product. Legislation became necessary when the persons engaged in the business exceeded their legitimate rights and made *unreasonable* charges. The legislature did not interfere, so long as the charges were reasonable. It merely prohibited unreasonable charges, by fixing a limit of reasonableness. It did not in any way attempt to interfere with property rights, but merely sought to prevent imposition and extortion.

Lake Shore, etc., Ry. Co. v. Smith, 173 U. S., 684, 698.

At common law, however, the reasonableness of a rate had very little to do with the amount of return received by the owner of property upon the capital invested in the business. Whether or not a rate was reasonable depended principally upon the nature of the service rendered and the charges that were usual in that class of business. The value of the property employed or the return realized upon the property was so slight a factor that it was virtually ignored.

Canada Southern R. Co. v. International Bridge Co., 8 App. Cas., 723, 731;
Transportation Co. v. Parkersburg, 107 U. S., 691 699;
Interstate Commerce Commission v. Railroad Co., 145 U. S., 263;
Cotting v. Kansas Stock Yards, 183 U. S., 79, 95-7.

1. In Canada Southern R. Co. v. International Bridge Co., Lord Chancellor SELBORNE thus expressed the opinion of the House of Lords (p. 731):

> "It certainly appears to their Lordships that the principle must be, when reasonableness comes in question, not what profit it may be reasonable for a company to make, but what it is reasonable to charge to the person who is charged. That is the only thing he is concerned with. They do not say that the case may not be imagined of the results to a company being so enormously disproportionate to the money laid out upon the undertaking as to make that of itself possibly some evidence that the charge is unreasonable, with reference to

the person against whom it is charged. But that is merely imaginary. * * * It seems to their Lordships that it would be a very extraordinary thing indeed, unless the Legislature had expressly said so, to hold that the persons using the bridge could claim a right to take the whole accounts of the company, to dissect their capital account, and to dissect their income account, to allow this item and disallow that, and, after manipulating the accounts in their own way, to ask a court to say that the persons who have projected such an undertaking as this * * * are to be regarded as making unreasonable charges * * * because the Bridge Company gets a dividend which is alleged to amount at the utmost to 15%. Their Lordships can hardly characterize that argument as anything less than preposterous."

2. In Transportation Co. v. Parkersburg, this Court said (p. 699):

"It is also obvious that since a wharf is property and wharfage is a charge or rent for its temporary use, the question whether the owner derives more or less revenue from it, or whether more or less than the cost of building and maintaining it, or what disposition he makes of such revenue, can in no way concern those who make use of the wharf and are required to pay the regular charges therefor; provided, always, that the charges are reasonable and not exorbitant."

3. The language employed in the International Bridge case *(supra)* was quoted with approval in the Cotting case (183 U. S., 96), where Mr. Justice BREWER, in commenting upon it said (p. 97):

"The question is always, not what does he make as the aggregate of his profits, but what is the value of the services which he renders to the one seeking and receiving such services. Of course, it may sometimes be, as suggested in the opinion of Lord Chancellor SELBORNE, that the amount of the aggregate profits may be a factor in considering the question of the reasonableness of the charges; but it is only one factor, and is not that which finally determines the question of reasonableness."

II. Had this common law principle of reasonableness been kept clearly in view, many of the perplexities of the subject in re-

gard to the valuation of the property and the amount of the return would have been avoided. Chief Justice WAITE, for instance, would never have suggested, as he did in the Granger Cases (94 U. S., 178), that the power of the legislature in the regulation of rates was supreme and was not subject to review by the court.

But when, in the later cases, the point was clearly presented, that such a power as that which was claimed by the legislature might destroy a business or deprive a property of its productive capacity, the courts were brought face to face with the constitutional limitations imposed upon state legislatures, instead of approaching the question from the common law point of view of what was reasonable in view of the services rendered and the charges which prevailed in that kind of business. From the constitutional point of view, it was so obvious that the fixing of a rate which would not permit *any* return upon the property would be a deprivation of property rights and of the equal protection of the laws, that the courts were driven to the conclusion that a regulation which would produce such a result was void. If, in considering the constitutional question of the effect of the state legislation upon property rights, the proper criterion is that such legislation must permit a return upon the value of the property invested in the business, it must follow that the legislature cannot discriminate between different classes of property or determine for itself that, on some kinds of property, the owner shall be entitled to a return but that upon other kinds of property, he shall have no return. That being so and it being conceded that special franchises are property " in the highest sense of the term " (111 N. Y., 1, 40), the Federal Constitution protects it from invasion, no matter what form that invasion may assume (165 N. Y., 274, 280).

TWELFTH.

Difficulties suggested by the trial Court.

In the course of his opinion, Judge HOUGH gave full expression to the difficulties which he encountered in reaching the conclusion that special franchises must be included in the assets upon which the Company is entitled to a return. He felt compelled, however, to disregard his own doubts on the subject, "because to refuse would disregard views expressed by higher courts regarding the general nature of franchises and regulation proceedings"; and he, therefore, followed "the method of reasoning there *clearly indicated*" (Record, p. 414).

The "views expressed by higher courts" and the "method of reasoning" to which he referred were those which have heretofore been set forth, namely, that special franchises are property and, therefore, cannot be disregarded by the legislature in the regulation of rates or in any other manner. Economic doubts and metaphysical speculation on the subject are, therefore, idle, as was conceded by the learned trial Judge, after he had given expression to them (Record, p. 414). To enter upon a discussion of them under the circumstances is scarcely necessary; but inasmuch as the doubts expressed in the opinion reflect some of the reasons relied upon by counsel for the appellants, a brief reference to them may not be out of place.

I. The reason upon which the greatest stress was placed in the Court below and that which apparently made the deepest impression upon the trial Judge was that the Company did not give a valuable consideration for its special franchises. How far the Court was carried by this suggestion is best shown in its own language (Record, p. 411):

> "It is not asserted that any right such as above described (special franchise right) was ever *bought* by complainant from either State or City, or that for such right any valuable consideration was ever paid *in the usual legal sense of those words*."

And again (Record, p. 412):

> "Return can be expected only from investment, and he that invests must part with something in the act of investing. He that hath not sown shall not reap."

Such utterances sound strangely at this hour of the day. Views of that kind may have been entertained a hundred years ago with respect to corporate franchises; but since the Dartmouth College case, they have rarely been indulged in by the Courts. To assert that no valuable consideration was ever paid, "*in the usual legal sense of those words*", for the special franchises of the appellee, is to ignore one of the most common elements of a legal consideration, recognized from the earliest days of the common law and forming a well settled principle of the Roman Law.

2 Blackstone Com., 444.

1. There is no affirmative evidence of any kind in the record to show that the constituent companies of the appellee did not make substantial cash payments for their franchises. Assuming, however, that they did not make such payments, the consideration they actually gave for their franchises was no less valuable and substantial. The important contribution made to civilization by the introduction of gaslight has been frequently dwelt upon by historians and courts. Thus, in New Orleans Gas Co. v. Louisiana Light Co. (115 U. S., 650), Mr. Justice HARLAN, in writing for a unanimous court, characterized the business of manufacturing gas as (p. 669) "one of the most important agencies of civilization, for the promotion of the public convenience and the public safety"; and he quoted with approval (p. 658) the statement made in Knight's History of England, that "the adventurers in gas lights did more for the prevention of crime than the government had done since the days of Alfred".

And the New York Court of Appeals employed equally

impressive language in Harlem Gas Co. v. Mayor (33 N. Y., 309, 327):

> "In our northern latitudes, when darkness prevails over half the twenty four hours for a large part of the year, light diffused through the public streets and avenues is a predominant and urgent necessity, which no well governed city can do without. This beneficient application of artificial light is one of the distinguishing characteristics between the city of modern times and those of the middle ages, when darkness reigned supreme for no inconsiderable portion of the time, broken only to become more visible by the occasional torch of the linkboy or the lantern of the solitary watchman. The modern gaslight, diffusing its rays over every part of the public thoroughfare, is a source of pleasure and comfort and convenience, as well as a security against crime and disorder, which no other agency can supply. It is indispensable at all times; and no municipality can be said to be well governed which is not able to command its presence under all circumstances."

Some of the constituent companies of the appellee date back to the early part of the last century, when the business of attempting to supply gas for illuminating purposes was an untried and extremely precarious one. Many enterprises in which the public are interested owe their origin to the generous disposition of public spirited citizens, who contribute their capital, not for the sake of investing it advantageously but to advance the general welfare. Many enterprises require to be encouraged in order to induce capital to embark in them. In the case of the New York Subway railroad, for instance, capital could not be induced to invest in the enterprise, at the outset.

Sun Publishing Co. v. Mayor, 152 N. Y., 257, 273;

and the same timidity existed when the construction of an elevated railroad was originally contemplated.

Mayor v. Manhattan Ry. Co., 143 N. Y., 1, 30–32 (PECKHAM, J.).

Railroad companies have not only, in numerous instances, been given free rights of way through the streets of villages

and cities, but large tracts of valuable land and other property have frequently been made exempt from taxation for a period of years; and, in the early days of railroad construction, it was a matter of common occurrence for municipalities to bond themselves for large amounts, in order to raise the capital required for the construction of the roads; and similar inducements were given to gas companies.

New Orleans v. Clark, 95 U. S., 644;
New Orleans Gas Co. v. Louisiana Light Co., 115 U. S., 650, 670.

And the general gas Act of New York, passed in 1848, conferred power upon the municipal authorities to exempt gas companies from taxation on their personal property for three years.

L. 1848, Ch. 37, Sec. 18.

This principle of fostering infant industries is relied upon as the complete justification of the protective tariff, a policy to which the nation has long been committed.

When, therefore, these gas companies originally furnished the capital for a new and uncertain enterprise, they were giving a consideration for the right to occupy the streets, which, at the time and until recent popular agitation on the subject, was considered by every one to be ample.

The adequacy of such consideration has been expressly recognized by the New York Court of Appeals and by this Court.

Mayor v. Manhattan Ry. Co., 143 N. Y, 1, 30, 31;
Bridge Proprietors v. Hoboken Co., 1 Wall., 116, 146;
Re Binghampton Bridge, 3 Wall., 51.

In the latter case, the Court said (p. 74):

> "The legislature, therefore, says to public spirited citizens: 'If you embark with your time, money and skill in the enterprise which will accommodate the public necessities, we will grant to you for a limited period or in perpetuity privileges that will justify the expenditure of your money and the employment of your

> time and skill.' Such a grant is a contract, *with mutual considerations ;* and justice and good policy alike require that the protection of the law should be assured to it."

2. Even if the constituent companies gave no consideration for their franchises and those franchises should be considered as a gift, that fact would not deprive them of their character as property. On the theory that it would, any property presented by one person to another would have no value to the donee ; and our laws of descent and distribution would cease to have any significance, if they did not confer full property rights upon the beneficiaries.

As Mr. Justice STORY said, in the Dartmouth College case (4 Wheat., 518, 683) :

> "When a contract has once passed, *bona fide*, into grant, neither the King nor any private person who may be the grantor can recall the grant of the property, although the conveyance may have been purely voluntary. A gift completely executed is irrevocable."

Much of the right of way and frequently the terminals of our railroad companies were donated to them, the national government making extensive donations of federal lands to the transcontinental railroad companies. It not only granted a right of way to the Union Pacific Railroad Company but also made enormous land grants to it, and timber rights ; and it lent to the Company the credit of the nation, to the extent of $16,000 a mile for the entire line. In referring to the contention subsequently made, that the conditions on which these grants were made could be disregarded or changed by Congress, this Court said, in the Sinking Fund Cases (99 U. S., 700, 719) :

> "They cannot legislate back to themselves, without making compensation, the lands they have given this corporation to aid in the construction of its railroad."

On the appellants' contention, it would be improper, in fixing the maximum rates for railroad companies to include

such of these lands as were devoted to railroad purposes among the assets on which the companies are entitled to a return. But there is not a rate case where such a suggestion has been made. That it makes no difference how or on what terms the property was acquired was expressly recognized in Ames v. Union Pac. Ry. Co. (64 Fed. Rep., 165), where it was contended by counsel for the State Board of Transportation that no return should be permitted on the right of way, because it had been donated by the Government. In that case, Mr. Justice BREWER applied the rule which prevails in condemnation proceedings to the case of rate regulation, and said (p. 176):

> "No inquiry is open as to whether the owner has received gifts from the state or individuals. * * * It is enough that he owns the property—has the legal title; and so owning, he must be paid the actual value of that property. If he has done any wrong in acquiring or using the property, that wrong must be redressed in a direct action therefor, and cannot be made a factor in condemnation proceedings. These propositions in respect to condemnation proceedings are so well settled that no one ever questions them. *The same general ideas must enter into and control legislation of the kind before us.*"

The notorious scandal connected with the acquisition of the Broadway Railroad franchise resulted in the repeal by the Legislature of the charter of the Company; and yet the Court of Appeals, in discussing the question of the franchise, said (111 N. Y., 1, 31):

> "We know not only from contemporary history but from cases which have already reached this Court, that serious questions have arisen with reference to the propriety of the means by which the corporators of the company obtained this consent from the municipal authorities; but they are not involved in this case and have no bearing upon the questions presented for discussion by the record."

In the same case, the Court of Appeals quoted with approval (p. 52) the following remarks of Judge COOLEY

(City of Detroit v. Detroit etc. Plankroad Co., 43 Mich., 140):

> "It cannot be necessary at this date to enter upon a discussion in denial of the right of the government to take from either individuals or corporations any property which they may rightfully have acquired. In the most arbitrary times, such an act was recognized as pure tyranny, and it has been forbidden in England ever since Magna Charta, and in this country always. It is immaterial in what way the property was lawfully acquired, whether by labor in the ordinary avocations of life, by gift, or descent, or by making a profitable use of a franchise granted by the State; it is enough that it has become private property and it is thus protected by the 'law of the land'."

Even if it should be assumed that the special franchises of all the public service corporations in New York were the free gift of the State, the people of the State are reaping the benefit not only in the multiplication of conveniences, which have become necessities, but in the fact that these franchises, estimated by the Court of Appeals to be worth $200,000,000 (174 N. Y., 437), are now returning to the State a large revenue in the shape of taxes.

3. The suggestion of Judge HOUGH (Record, p. 412), that the appellee did not invest any property *in* the special franchises, but *under* them, is an obvious misconception, resulting from his confusing a special franchise with a general franchise and from assuming that nothing has value for which a cash payment has not been made. If even a small cash payment had been made, he would have been forced to say that there had been an investment *in* the franchise. Manifestly, if services or risks equivalent to cash payments were performed or assumed, the investment is equally *in* the franchise. In either case, a correct balance sheet of the Company would include among its assets the value of its special franchises.

4. *Analogies relied upon.*

The illustrations employed by the learned trial Judge, to emphasize the difficulty of treating special franchises as

property, show a misconception of both economic and legal principles. He conceived that there was a difference between such property and "land or money," because, in the case of a franchise, he could not perceive that there was any property right in the franchise "before a main is laid or a foot of gas manufactured" (Record, p. 412). But special franchises do not differ in this respect from any other kind of property, even such tangible property as "land or money." Definite and precise value is confounded with value in general. The wild lands granted by the national government to the Union Pacific Railroad Company, remote from any settlement, had no market value before the railroad was projected; and many experienced business men regarded the project as visionary and believed that it would not succeed. But such lands were property, in the legal sense, just as completely as the most highly improved land in the heart of a city. Money in the pocket of a wrecked mariner on a desert island has no present value; but it would be property even if it were certain that the unfortunate possessor of it would spend the remainder of his days alone on the island. Value varies necessarily with the use, but is not solely dependent upon the use. The historical illustration of a town crier or herald (Record, p. 412) illustrates very well the confusion in which the Court became involved, as will appear by following the illustration to its logical conclusion. The Court asks whether any value is attached to such franchise, "beyond the right of working under its protection for a fair wage", and whether the herald would be justified in charging two prices for his proclamation, one for the service and the other as return for income on his franchise. The essence of all property rights is to permit their exercise for a profitable return; and there is no difference in principle between the right of a public herald to exercise his calling and the right accorded to every citizen to pursue his chosen vocation. If the right granted to the herald was recognized

by the law to be assignable (as is the case with special franchises), then it is something which could be sold or exchanged for "money or land."

The essence of a property right is not its actual exercise, but the authority to exercise it. There is, therefore, no greater difficulty in the case of a special franchise than there is in the case of wild land. The fact that no capital has been invested in its development makes no difference either in the economic or legal sense.

All doubt on this point has been set at rest in New York.

People v. O'Brien, 111 N. Y., 1;
Suburban Rapid Transit Co. v. New York, 128 N. Y., 510;
People v. Neff, 19 App. Div., 590, 592-3.

The Broadway Railroad franchise had been mortgaged for millions of dollars before a rail had been laid; and yet the Court of Appeals, with unusual warmth, repudiated the suggestion that it was not property, in every sense of the term; and in the case of the Suburban Rapid Transit Railroad Company, the Railroad Company had not even acquired its right of way; yet its property rights in the franchise were held to be inviolable, even as against the exercise of the power of eminent domain by a municipality.

In People v. Neff, Mr. Justice CULLEN (now Chief Judge of the Court of Appeals), in delivering the opinion of the Court, made a statement which affords a complete answer to Judge HOUGH'S suggestion, that there is no property right in a special franchise "before a main is laid or a foot of gas manufactured":

> "In the case of Coney Island, [illegible]t Hamilton and Brooklyn R. R. Co. v. Kennedy, *et al.* (15 App. Div., 588), we held that *though the plaintiff had not laid a rail nor entered upon the street*, its franchise was as absolutely property as the land abutting on the street, and that the former could no more be taken for public purposes without compensation than the latter. This was the law laid down in the case of Suburban Rapid Transit Co. v. Mayor (128 N. Y., 510)."

The learned District Judge was of the opinion that "the concepts of the nature and value of franchises are seen dimly and confusedly because of the failure to distinguish between productive and non-productive property" (Record, p. 412).

The confusion is not due to the failure to distinguish between productive and non-productive property, because property rights do not depend upon the productivity of the property; it is due to the failure to note the essential nature of property. The Court thought that the great distinction between "land, money and chattels," on the one hand, and franchises on the other, was that the former could be made productive without a franchise. But there are many chattels, such as works of art, which have a large property value and which are not productive at all. Money itself is not productive, its value depending upon its service as a convenient medium of exchange; and land is, in its ultimate analysis, nothing but a right or franchise recognized by the state.

The conclusion of the Court (Record, p. 413), that a franchise "possesses no more economic value for the investor than does an actual shield possess fighting value, apart from the soldier who bears it," is no more true as applied to franchises than it is as applied to land or chattels or any other kind of property. In every case, the law which protects the individual in his claim to a particular portion of the earth's surface is a shield, without which there would be no value. All property rights are dependent upon the shield of the law. Remove that protection and the conception of property and property rights, which is the basis of our system of jurisprudence, would cease to exist.

Throughout this discussion by the Court, it is noticeable that the word franchise (as applied to the public herald, for instance) is frequently employed in the sense of general franchise or right to engage in a particular business. No contention is made, in the present case, that the appellee is

entitled to a return upon the value of its general franchise to manufacture and supply gas.

To assert that, " on every private sale of franchise property, the price paid is so much *money* lost to the public by official incompetence or worse " (Record, p. 413) is to make a statement which has no more point economically speaking, as applied to franchises, than it has as applied to any other species of property. In the sphere of government, it may be that the incident of taxation should properly fall heavier on that class of property, the use of which brings the greatest benefit to the owner and imposes the heaviest burden on the public; but such considerations are wide of the mark in a discussion of the legal principles involved in the recognition of fundamental property rights.

How far this sentiment, as expressed by the Court, may carry its adherents, is illustrated by the radical utterance of a highly respected member of the Public Service Commission of New York for the Second District (Mr. Thomas M. Osborne), who, in an article in the Atlantic Monthly for April, 1908 said (p. 553) :

> " A franchise granted by the legislature of fifty years ago belonged then to us of today quite as much, if not more, than to our grandfathers who handed it over to some railroad in perpetuity; it belongs to us now, as it will belong to our grandchildren in their turn. The action of the legislature of two generations ago in giving away our birthright is not morally a binding contract upon us today, when it comes in conflict with the present or future public interest, and the vested rights of the private inheritors of that franchise will not finally stand when they come in conflict with the vested rights of the State."

That is the view which Mr. Henry George entertained with respect to real estate; but even Mr. George was not bold enough to declare that such a policy should be forthwith put into effect. He was of the opinion that the

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desired result should be attained by concentrating taxation upon that form of property.

Mr. Osborne's advanced views produce the effect upon the reader which the New York Evening Post, of February 24, 1906 (an habitually severe critic of the public service corporations of New York City) expressed, in referring to the conclusion of the former Gas Commission, that, in estimating the value of the properties of gas companies, their special franchises should *not* be included:

> "Whatever may be said of the other reasoning of the Gas Commission, its deliverances about the value of a franchise *leave the reader gasping.* * * *
>
> "The value of the franchise is an indestructible part of the property to be acquired. The fact that it was given for nothing is an excellent reason for giving no more in that way, but once granted, the franchise is property, which not even the legislature can confiscate."

THIRTEENTH.

Other imaginary difficulties.

Other reasons for disregarding the special franchises were suggested in the Court below, which were apparently not deemed worthy of comment by the Court, in its opinion.

I. One of these has already been alluded to (*ante*, p. 27), namely, that the franchises should not be included in the assets of the Company, because the tax upon the franchises had been allowed as an operating expense. But, as has already been observed, that kind of reasoning would be equally applicable to the real estate and all other property of the Company, none of which is exempt from taxation. Such reasoning would lead to the conclusion that the Company is not entitled to any return upon any of its property, so long as it is permitted to earn enough to pay taxes.

II. It was also suggested that the special franchises were acquired subject to the right to regulate rates. That is equally true of all the other property acquired by the Company. The right to regulate, however, is limited to allowing a fair return upon the reasonable value of *all* the property of the Company.

III. An additional reason advanced for not including the franchises among the assets is that, to do so, would prevent any regulation of the rate.

This reason seems to have been suggested by Messrs. Beale and Wyman, in their recent publication of "Railroad Rate Regulation" (Sec. 372). But the only authority cited in the work in support of the statement is Brunswick, etc., Water District v. Water Co. (99 Me., 371). The case is not at all in point, as it was a condemnation proceeding, where the Legislature had expressly directed that the value of the special franchises should be taken into consideration. Messrs. Beale and Wyman state that there is "one" case (Spring Valley Water Works v. San Francisco, 124 Fed. Rep., 574), which contains a *dictum* to the contrary of their assertion. It was not a *dictum*, as the point was carefully considered and passed upon in that case, and the value of the franchises was included in estimating the value of the assets of the company upon which it was entitled to a return (124 Fed. Rep., 574, 596).

The *dicta* to the contrary, to which the learned authors might have referred are those of this Court, which have heretofore been given (*ante*, p. 22). The treatment accorded the subject by these authors is, as the Court below observed, "summary and insufficient" (Record, p. 413); and this is illustrated by their statement (Section 364), that it "is not entirely clear on the authorities" whether compensation must be made for the franchises of a public service corporation taken in the exercise of eminent domain. There is certainly no doubt on that point in the courts of New York or in the Federal courts.

Matter of White Plains Commissioners, 176 N. Y., 239;
Monongahela Nav. Co. v. U. S., 148 U. S., 312.

The reason advanced by these authors for not including the franchises is evidently unsound as applied to special franchises in New York. It assumes in the first place, that a special franchise has no value except as shown by the net earnings of the company. While it is the productive use of property which produces a return upon the investment, the failure to put it to such use does not render the property worthless. A vacant piece of land may be worth just as much per square foot as adjacent land upon which there is the most adequate and costly improvement. A gas or railroad company, which had an undoubted franchise to use the streets of New York in perpetuity, could dispose of that right for a very large amount, even though it had never attempted to exercise it; or it could be mortgaged for the purpose of raising money to construct the plant of the company, as was done in the case of the Broadway railroad.

People v. O'Brien, 111 N. Y., 1, 31.

The fallacy of the argument is in assuming that the value of a special franchise cannot be considered without giving it a value based upon the unregulated rate or the highest possible rate. That is not necessary in the case of franchises any more than in the case of any other property of the corporation. Inasmuch as the legislature has the power to regulate rates, manifestly, the value of the franchises of a public service corporation is governed and limited by the existence of that legislative authority. No public service corporation has an absolute right to any continued fixed rate, in the absence of an express contract to that effect; and the value of its franchises must be estimated in view of the possibility of a regulation of the rate. That the value of these special franchises is not to be determined from the net earnings alone but from all the circumstances and conditions under which they are exercised was expressly declared in the Franchise Tax Cases.

People v. Tax Commissioners, 174 N. Y., 417, 440.

The argument has no greater force as applied to franchises than it has as applied to tangible property. The value of the plant of a

going concern, which is in successful and profitable operation, under favorable conditions, is very much greater than the value of the same plant, if the business is conducted at a loss or is discontinued. In the latter case, the plant may cease to have any value, except to the dealer in second-hand materials. If a company is permitted to earn 20% a year on the value of its plant, that value is much greater than if the company should be permitted to earn only 6% upon the same plant. The record shows (pp. 511, 1703) that the Eighteenth Street plant of the Company has recently been taken by the City, in condemnation proceedings, for the North River water front improvement. It was of great value to the Company; but it probably did not add anything to the market value of the land, when it ceased to be used in connection with the gas business. The manufacturing plant of every gas company is more valuable with gas at a high rate than at a low rate; but that fact does not prevent a reduction of the rate. It is not the value of the property at any given rate that the court ascertains in these cases, but the reasonable value of the property under all the existing conditions, including the fact that the legislature has the power to reduce the rate if the price charged is unreasonable. There is no greater difficulty in allowing for this element of reduction in the rate in the case of special franchises than there is in the case of the manufacturing plant. Even if there were, it would not affect the legal principle involved. Where there is a breach of contract, it may be extremely difficult to ascertain the damages sustained by the injured party; but that does not affect his right to recover damages, even though they may be largely conjectural.

Wakeman v. Wheeler & Wilson Co., 101 N. Y., 205.

And this is true in substantially all cases where actions are brought to recover unliquidated damages, whether arising in tort or growing out of contract.

IV. Another fanciful argument was advanced in the Court below, partly as a reason for not including the special franchises among

the assets of the Company and partly as an apology for the manifest injustice of imposing a tax of $24,000,000 upon a right which the Legislature defined as "real property" and ignored when it attempted to regulate the rates to be charged by the Company.

This "argument" was, in effect, that if the legislature should ignore the special franchises in fixing a rate, such franchises would cease to have any value and, therefore, would not be subject to taxation, and consequently no injustice would be done. In other words, as one of the counsel for the Attorney General forcibly expressed it, the franchises would be "annihilated". In the Brief filed by him in this Court, the milder term, "destroy", is employed (Brief, p. 58).

The learned counsel failed to point out that this "argument" would be just as effective if applied to the manufacturing plant of the Company. Ignore the plant in fixing your rate, and all will be well, because then you will not have to pay any tax upon it.

But even if that were a sound conclusion as applied to real estate, it would not be so as applied to the special franchises, for the very simple reason that, in spite of the fact that no return was permitted upon them, they would continue to have a substantial value, so long as any return whatever was received from the tangible property; because, it is the exercise of the franchises that gives value to the tangible property, and the franchises would, therefore, have value, so long as it was profitable to operate the plant of the Company.

People v. Tax Commissioners, 174 N. Y., 417, 440; 199 U. S., 1;
Gue v. Tidewater Canal Co., 24 How. U. S., 261, 263;
State Railroad Tax Cases, 92 U. S., 575, 606.

Even if the business of the Company were, for a year or more, conducted at a loss, it is perfectly certain that the special franchises would continue to be assessed under the statute.

The only manner, therefore, of completely "annihilating" the special franchises would be by "annihilating" the value of the tangible property also. In other words, confiscate all the property,

and the luckless property owner will have nothing to complain of, because he will no longer have to pay any taxes.

A curious consequence of this "argument", which the counsel did not call attention to, would be that if it were applied to the appellee, so that it would be relieved of paying the taxes upon $24,000,000 worth of property, the citizens of New York would have to tax themselves to make good the difference and would thus be compelled to pay out for the support of the government what they had saved in their gas bills.

FOURTEENTH.

Proposed impairment of contract rights.

The appellants contend that no return should be permitted upon special franchises, because, in granting those franchises, the legislature reserved the right to ignore them in the regulation of the rates to be charged by the Company.

I. The burden rested upon the appellants to show such reservation. No attempt of that kind was made, and no such attempt could possibly have succeeded, because the special franchises of the Company were granted long before the days of universal rate regulation and long before the full possibilities of that potent and at present popular power had dawned upon the legislative mind.

In the Dartmouth College Case (4 Wheat., 518, 712), Mr. Justice STORY said:

> "In my judgment, it is perfectly clear that *any* act of a legislature which takes away *any* powers or franchises vested by its charter in a private corporation, *or which restrains or controls the legitimate exercise of them* * * * is a violation of the obligations of that charter. *If the legislature mean to claim such an authority, it must be reserved in the grant.*"

II. An unconditional grant by a State constitutes a contract, which is entitled to protection under the Constitution just as fully as a grant made by an individual.

Fletcher v. Peck, 6 Cranch, 87 ;
Sinking Fund Cases, 99 U. S., 700, 719 ;
New Orleans Water Works Co. v. Rivers, 115 U. S., 674, 681 ;
People v. O'Brien, 111 N. Y., 1.

Fletcher v. Peck was decided several years before the Dartmouth College case; and the reason for the conclusion reached by the Court was set forth with characteristic lucidity and point by Chief Justice MARSHALL, who, in the course of his opinion, said (pp. 137–8) :

> " The contract between Georgia and the purchasers was executed by the grant. A contract executed, as well as one which is executory, contains obligations binding on the parties. A grant, in its own nature, amounts to an extinguishment of the right of the grantor, and implies a contract not to reassert that right. A party is, therefore, always estopped by his own grant. * * *
>
> " If, under a fair construction of the constitution, grants are comprehended under the term ' contracts ', is a grant from the State excluded from the operation of the provision ? Is the clause to be considered as inhibiting the State from impairing the obligation of contracts between two individuals, but as excluding from that inhibition contracts made with itself? * * *
>
> " What motive, then, for implying, in words which import a general prohibition to impair the obligation of contracts, an exception in favor of the right to impair the obligation of those contracts into which the State may enter ? * * *
>
> " The legislature is then prohibited from passing a law by which a man's estate, or any part of it, shall be seized for a crime which was not declared, by some previous law, to render him liable to that punishment. Why, then, should violence be done to the natural meaning of words for the purpose of leaving to the legislature the power of seizing, for public use, the estate of an individual in the form of a law annuling the title by which he holds that estate ? "

III. The grant in the present case was the right to occupy the streets of the city with the mains and pipes of the Company. Suppose these had been laid through private property, under grants

or easements obtained from individual owners, could it reasonably be contended that it would be no impairment of the contract rights of the Company, if, in the regulation of rates, the State should ignore these easements in private property? Is it conceivable that, under such circumstances, all that the Company would be entitled to receive would be a return only upon the reproductive value of the mains and pipes and not upon the much greater value of the easement in the streets, by which it acquired the right to lay and use the mains and pipes and the continuous right of access to them for the purpose of keeping them in repair? If not, then, under the decision in Fletcher v. Peck, there is not a particle of difference, in legal effect, between an easement obtained from an individual and one obtained from the State; in the one case, it is carved out of private property belonging to the individual and, in the other, out of public property owned or controlled by the State. In both cases, the very fact that the right is possessed necessarily permits it to be exercised in the same manner as any other property right, that is, for the purpose of obtaining a profit from its use. Such use is an attribute of ownership.

Case of the State Freight Tax, 15 Wall., 232, 277-8.

To deprive the appellee of all return upon its special franchises would, in the language of this Court, in Pearsall v. Great Northern Ry. Co. (161 U. S., 646, 673), be "so far destructive of the original grant as to render it valueless, although there might, in neither case, be an express repeal of any of its provisions."

That the special franchises of the appellee would be rendered valueless if no return were allowed upon them is the insistent contention of the appellants.

IV. The regard which a State should have for its fair name ought to make it even more reluctant to ignore a grant made by it than one made by an individual, to which it was not a party. If an individual had granted the right to the Company through his private lands, the State might contend, without the taint of personal dishonor which attaches to the repudiation of a contract by a party

to the contract, that the only property actually employed in the business was the tangible property and that the right to maintain the mains was merely the right to put the tangible property to profitable use and, therefore, had itself no intrinsic value. But for the State to make that contention, when it had not reserved the right in its grant, would be to repudiate its own contract obligations. In the absence of an express reservation, the State has no greater power to deprive its grantee of all return upon the value of an easement, than it would have, in the case of a grant of land for the exclusive use of a gas manufacturing plant, to insist that the land was granted merely to enable the gas to be manufactured and distributed and that, as the land was thus a mere instrument to carry out the main object of the Company's business, no return should be permitted on its value, although the State placed a large valuation upon it for purposes of taxation.

FIFTEENTH.

The Brief of the Attorney General.

I. In the brief filed by the Attorney General in this Court, it is conceded (Brief, p. 68) that, in the Special Franchise Tax Cases, the Court of Appeals held special franchises to be property; and the further concession is made (Brief, p. 20, Sub. 9) that special franchises "*are property which the public cannot condemn and take over without paying a reasonable compensation therefor.*"

No attempt is made to explain why the State must treat these franchises as property for one purpose and why it may ignore them for another purpose. It is true that the suggestion is made, that the franchises were granted subject to the right of the State to regulate the rates to be charged by the Company. But no reservation is referred to; and regulation means reasonable limitation, not confiscation or total disregard of existing property. Special fran-

chises are, of course, granted subject to the legislative power of regulation; but they do not differ in that respect from any other property. The real estate of a public service corporation is also subject to the power of rate regulation, and its value will depend, to some extent, upon the maximum rate allowed; but that does not mean that such real estate may be ignored when the legislature establishes the rate.

II. In discussing the question of franchises in his Brief, the Attorney General repeatedly employs the term in the sense of general franchises, that is, the right to engage in the business of manufacturing and supplying gas to the public, as distinguished from special franchises, or the right to maintain mains in the city streets. This general sense is that in which the term is used in the Fourth, Fifth and Thirteenth Points (pp. 27, 54). It is this confusion which causes him to assert, in his Third Point (p. 27), that the only property which the Company uses in manufacturing and supplying gas is its tangible property. Would he say that, if the Company had acquired a right of way through private property instead of through the city streets?

The East River Gas Company of New York condemned a right of way for a tunnel under the East River, so as to enable it to bring its gas from the Brooklyn side of the River to the Manhattan side (Matter of East River Gas Co., 119 App. Div., 350). Can an expensive conduit of that kind be disregarded in fixing the price of gas for that Company? Or, suppose a gas company had its manufacturing property in the centre of a block and could obtain connection with its mains in the streets only through land owned by private individuals; could its right of way through such lands be disregarded in fixing a rate of return upon its property? The tunnels under the East River and the smaller tunnels under the streets constitute the right of way of the East River Gas Company; and such right can no more be disregarded than the right of way of a railroad corporation. On the contention of the Attorney General, he would be forced to assert that a railroad company should not be permitted to include its right of way among its assets, upon

which it is entitled to a return, but only the cost of reproducing the ties and rails. It is no answer to this conclusion to say that the railroad company owns the fee of the land constituting its right of way. That is presumably not the law in New York, where only such interest is taken as is required (Sixth Ave. Ry. Co v. Kerr, 72 N. Y., 330, 332–3); but even if it were, the exact nature of the title or interest owned is of no consequence, in considering whether that which is actually owned is property. In the case of a street railroad in Broadway, for instance, what is the value of the rails as compared with the right to lay and use them?

III. The attempt is made to show that Smyth v. Ames (169 U. S., 466) holds that a return is permitted only on tangible property. What the Court was considering in that case was the return on tangible property; and its remarks were, of course, primarily applicable to that kind of property. That it did have in mind also the value of the property of the company as an organic whole, including the intangible property, is evident from a consideration of the entire opinion and also from the expressions of the Court heretofore quoted (*ante*, p. 23).

IV. In the discussion by the Attorney General of "the method of valuing special franchises", contained in the Eighth, Ninth and Tenth Points of his Brief (pp. 32-37), the same confusion is observable, of treating special franchises as synonymous with general franchises. The assertion that "there is absolutely no measure of the value of a franchise", except the profits derived from its use, is contrary to the conclusion reached by the Court of Appeals in the Special Franchise Tax Cases (174 N. Y., 417, 438-9). As heretofore stated (*ante*, p. 45), a franchise may have great value before the Company has acquired any tangible property. Indeed, no prudent investor would contribute capital for the construction of a costly plant for a gas or street railroad company until it had obtained the right to use the streets.

To assert that if a return should be permitted on the value of the special franchise of a company, an *excessive* rate once established could never be reduced, because the value of the franchise

depends on the rate charged, is to ignore the fundamental principle of rate regulation, that all property is held subject to the right to limit a return, upon the basis of a reasonable rate; and there is no difference in this respect between special franchises and any other kind of property (*ante*, p. 50). The suggestion of the Attorney General is effectively answered by himself, when he refers to the method of valuing the special franchises of a corporation in condemnation proceedings (Brief, p. 60):

> " If the franchises of a gas company were appropriated in condemnation proceedings, it would be entitled to compensation thereof at a valuation determined by the capitalization (at a reasonable rate) of the net earnings of the Company (under the prevailing *lawful* rate charged), over and above the sum which would represent a fair return on its tangible property."

On that basis, there would be no difficulty whatever in valuing the special franchises of the appellee; for the maximum rate which it could charge has been fixed by the Legislature ever since 1886.

L. 1886, Ch. 322;
L. 1890, Ch. 566, Sec. 70;
L. 1897, Ch. 385, Sec. 1.

Such maximum rate is a reasonable rate.

Brooklyn Union Gas Co. v. New York, 188 N. Y., 334;
Lake Shore, &c., Ry. Co. v. Smith, 173 U. S., 684, 695.

It was, therefore, scarcely worth while to indulge in such declamation as that which is found in the Attorney General's Brief (p. 72), where the actual facts are ignored and the appellee is charged with an attempt to capitalize " a prescriptive right of extortion."

V. The discussion in the Sixteenth Point of the Attorney General's brief (pp. 61-65), of the effect of the consolidation of 1884, shows a misapprehension both of the position of the appellee and of the nature of the Act under which the consolidation was made.

1. It has never for a moment been conceded nor suggested on the part of the appellee, that its constituent Companies

would not have been entitled to include among their assets, upon which they were entitled to a return, the value of the special franchises respectively owned by them.

2. Whether the Act under which the constituent Companies were consolidated contemplated a technical sale of the property and franchises to the new Company created by the consolidation is of no consequence, because the effect was precisely the same, inasmuch as a value was placed on the property and franchises of each Company, which was to be paid for by stock of the new Company. This transaction, however, did constitute a sale, as distinguished from mere barter, where no value is placed upon the articles exchanged. The consolidation agreement was not a purely formal agreement between these Companies for the operation of the business and the division of earnings. It was an actual sale and transfer of the title of the assets of each Company to the new Company, for a sum to be paid by the latter Company in its capital stock. Not only was each Company vitally interested in the valuation of its own property, but, as the Attorney General concedes (Brief, p. 63), if any stockholder objected to such valuation, he was entitled, under the Act (L. 1884, Ch. 367, Sec. 2), to have the value of his stock determined and paid for *in cash* by the new Company. The Act (Sec. 1) expressly provided that the capital of the new Company should not exceed "the fair aggregate value of the property, franchises and rights of the several companies thus to be consolidated."

The special franchises of the consolidating Companies were thus permitted to be sold to the new Company in precisely the same manner as any of the other property; and it was because of the complaint of the valuation which had been placed upon the property and franchises by the constituent Companies, that the legislative investigation took place, resulting in the report that such valuation could not be disturbed.

SIXTEENTH.

The Brief of the Public Service Commission.

I. The voluminous Brief (317 pages) filed on behalf of the Public Service Commission carries rate regulation into the clouds and leaves us in the region of dreamland and moonshine (166 U. S., 171, 222), where practical business considerations cease to have any influence. Is it possible, for instance, that the Consolidated Gas Company is actually receiving more than 22% upon the full value of all its property which is devoted to the public use (Brief, p. 239), and that the investing public has failed to grasp that fact? Is it a part of the scheme of present day government, that the legislature shall be regarded as a school of education in economics, to be supported by its unfortunate victims (Brief, p. 262)? Can it be that, in these times, a company is not properly managed, unless it borrows its capital instead of obtaining it in the old-fashioned way of issuing stock (Brief, p. 268)? Is it true that earnings devoted to the development and extension of a business belong to the patrons of the business and not to the stockholders, whose dividends were curtailed in order that the business might thus be developed and its facilities increased (Brief, pp. 244-5)?* How would this doctrine impress investors abroad, especially in England, where the application of earnings to betterments is universally capitalized? Is it reasonably conceivable that when individuals invest their money in a new public service business they are calculating for part of their return on the speculative profit to be realized from the real estate acquired for the business (Brief, p. 243)? And does a public service corporation fail to show that a given rate is confiscatory unless it also shows that the rate will be confiscatory upon all other corporations affected by it (Brief, p. 273)? Is it true that all of the gas companies in the city of New York are operating under the same conditions (Brief, p. 279), and

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* *Contra*, Brymer v. Butler Water Co., 179 Pa. St., 231.

that the conditions in the sparsely settled districts of the upper Borough of the Bronx are the same as those in the densely populated business and residential districts in the Borough of Manhattan? Is it possible to say that a board which values some of the property of a public service corporation at zero is fair-minded and does not make a flagrant attack upon the rights of property (Brief, p. 230)?

II. That the special franchises of the appellee are property and "*incorporeal real property*" is expressly conceded in this Brief (p. 293).

III. That the appellee possesses special franchises is also expressly conceded (Brief, pp. 79, 150*e*, 236). While it is asserted that these franchises have ceased to exist, that contention is obviously inconsistent with the admission that they do exist. If it is urged that they exist but can be terminated on notice, then it is no longer a question of their existence but of their value; and in another part of their argument (p. 81), counsel assert that a revocable franchise is valued in New York at as great an amount as if it were perpetual.

Attention is called by counsel to their sixth assignment of error (Brief, p. 154), on the ground that the Court failed to make an express finding as to the present existence of the New York, the Manhattan, the Municipal and the Metropolitan franchises. Counsel overlook the fact that the findings of the Special Master, that three of these franchises were perpetual, was confirmed by the Court (*post*, pp. 97, 110, 112).

Counsel seem to think that some ingenuity was shown by the appellee in discussing the validity of the Manhattan franchise before considering that of the New York franchise, which was earlier in point of time (Brief, p. 293). The reason this was done was because the Manhattan franchise contained an express grant of the right to lay mains (*post*, p. 99); and this provision was absent from the New York grant. It has been our contention that the intention of the legislature was the same in each case and that this

could be more clearly shown by taking up first the grant where the intention was actually expressed. In spite of their criticism, the learned counsel reach the same conclusion, as they concede (Brief, p. 300) that "there is much indication that the legislature intended to grant to the Manhattan Company the same nature and extent of power which it had granted to the New York Company."

The provision permitting the city to purchase the property of the Harlem Company at 10% more than the cost, upon which reliance is placed (Brief, p. 303), was, as we shall show later (*post*, pp. 91, 92), a nullity.

IV. It being conceded that the special franchises are real property and that the appellee possesses such franchises, recourse is had to the old argument that these franchises were granted subject to the condition that the grantee should receive a return only upon the actual investment. This suggestion has already been dealt with (*ante*, p. 53). No attempt is made to point out such a condition; but if, in making a grant, it was intended that the grantee should have a return on some of his real property but not on all of it, the exception should be clearly expressed. That no thought of such an exception was in the mind of the legislature when these grants were made is conceded by counsel for the Public Service Commission, when they state that the regulation of rates was "a thing almost unheard of until the public realized that competition was a thing of the past" (Brief, p. 262). Suppose it were shown that, in the case of each one of these grants, a large sum of money had been paid to the State or City for them; would it then be contended that there was an implied condition that no return should be received on the capital actually invested? But if not, where a money payment has been made, no more can it be implied where the grant was a gift or where the consideration was the acceptance of the grant and the investment of capital in the public enterprise.

The contention is again advanced that if the eighty cent rate should permit a return only upon the value of the tangible prop-

erty, there would be no value left for the special franchises. The fallacy of this has already been exposed (*ante*, p. 52).

It is also contended (Brief, p. 220), that the grant of a special franchise which does not fix the rate to be charged cannot be valued. It might as well be claimed that if land is granted to a railroad company for its right of way, and a schedule of the rates to be charged by the company is not appended, no return can be permitted on the value of the land. If a five cent fare is permitted, as in the Detroit case, or an 8% return, as in the Monongahela case, counsel would concede that the special franchise had a value which could not be ignored. But the mere statement of a specific amount can make no difference, if there is an amount which can be ascertained. In the present case, that amount is one which will permit a reasonable return upon all the property employed (6% or 8%, or 10%, or whatever the special facts may warrant); and while it may be more difficult to estimate the value of the franchise in such case, the difficulty does not affect the principle (*ante*, p. 51); and this is also shown by the fact that these franchises are universally valued for purposes of taxation.

The right to fix a maximum rate does not, as counsel contend (Brief, p. 224), preclude the special franchises from being valued on the basis of a reasonable rate, any more than it does in the case of the real estate or plant of the Company. The franchise is no more held subject to this servitude of regulation than any of the other property. All of the property is so held.

V. *The capitalization of 1884.*

Counsel treat this subject as if the details of the capitalization of 1884 were one of the issues in the case; and extracts from the testimony of the witnesses who appeared before the legislative Investigating Committee are quoted and the testimony is discussed with an amplitude of detail that would scarcely have been permitted even before that Committee. The most refined calculations are entered into to show that the value placed upon the special franchises did not represent the exact difference between the market value of the capital stocks of the Company and the appraised value

of their tangible property; and there is a perfect riot of figures on these minute points. But why all this burrowing into the past, when the only point involved is the fact that the franchises were capitalized with the sanction of the legislature? The complaint that they were over-capitalized was the occasion of the legislative investigation; but the Committee reported that the franchises of only four of the six companies were worth *much more* than the amount at which all of them had been capitalized (*ante*, p. 30).

VI. *The special franchise tax.*

Counsel set up a bogey in connection with the State Franchise Tax and proceed to annihilate it. They insist that we contend that the taxation of the special franchises constitutes an actual estoppel against the State, both as to their existence and duration and as to their value (Brief, p. 235). Our contention is that the taxation recognizes the existence of the franchise and that it is a property right (*ante*, p. 27; *post*, p. 85) and that the valuation by the State Tax Board, which is the only expert body capable, in the opinion of the Court of Appeals, of assessing such property (*post*, p. 118), is entitled to great weight in considering the value of these franchises. In New York, the State shares in the local taxation of real estate (Tax Law, Sec. 173).

VII. *Value of the special franchises and good will.*

There are no questions of fact which are more frequently referred for hearing and determination by courts of chancery to masters and referees than those involving the title of property and its value. In foreclosure and partition proceedings, this practice is universal. No court would have the time to consider the details involved in such questions. Much more is that applicable to the case at bar, brought before the highest appellate tribunal in the land, where the conclusions of the Special Master and Court rest upon an examination and consideration of many different instruments and acts and where local conditions and considerations have become a part of the learning and experience of those tribunals.

An elaborate attack is made upon the findings of the Court as

to the value of the special franchises. How elaborate that attack is may be inferred from the contention (Brief, p. 230), that the State may "at any time authorize or direct the city to build its own lighting plant" and that consequently the value of the special franchises are only nominal, because the Company could not compete with the City. In other words, because something may possibly happen in the indefinite future, which has never yet happened, to reduce the value of the franchises, one must act as if it had already happened, with the resultant loss. It is apparent that the State Tax Board does not take that contingency into consideration in assessing the franchises. Counsel do not stop to consider that the argument, if it is valid at all, inevitably leads to the conclusion that the value to be placed upon the real estate and plant must also be nominal; because, it is elsewhere urged that the plant can have no value except for the scrap heap (Brief, p. 219), if the special franchises cease to have value. On this basis of valuation, the Company is undoubtedly receiving a return of several thousand per cent on the actual value of its investment.

The main attack made upon the findings of value by the Court below is because the Court assumed an increase in value since 1884. Inasmuch as the population of the City and the consumption of gas have increased enormously since 1884, it is very obvious that the special franchises of the appellee, which the Court below found to be perpetual, have also greatly increased in value; and this is conceded in the Brief, where it is admitted (p. 221) that "the franchise has indeed an enormous value, so long as it is not terminable or terminated by expiration or revocation."

Even if, for the sake of the argument, the contention of counsel should be conceded, that the special franchises of the appellee are revocable, yet if, notwithstanding that fact, the State values them at $24,000,000 (and the method of valuation is not claimed by counsel to be erroneous), the finding by the Court that they are worth $12,000,000 cannot be regarded as excessive.

This question of value is treated more fully in a subsequent point (*post*, p. 116).

SEVENTEENTH.

The Brief of the City of New York.

No proposition has been advanced in the Brief filed on behalf of the City of New York, which has not already been considered. So far as the question of good will is concerned, the Brief is silent. On the question of special franchises, it furnishes numerous examples of the common fallacies pointed out in elementary treatises on logic. Thus, on p. 18, there is an example of *petitio principii*:

> "The very claim of a return upon franchise value involves an admission that the appellee has been receiving more than a fair return upon its investment for the public."

Here is another example of the same fallacy, in which the italics are those of the authors (p. 21):

> "*Nothing* is taken away *to which the Company had a right.* It never had a *right* to earn any more than a reasonable return on its investment."

An illustration of the *ad hominem* argument is found on p. 19 where it is surmised that the "cleverness of officials in concealing the truth" may have had something to do with the fact that the rates of the appellee were not sooner regulated; and this conjecture is re-enforced by allusions to the "excessive" charges heretofore made; thus entirely ignoring the fact that a maximum, and hence reasonable, rate fixed by the legislature of New York, has prevailed since 1886 (*ante*, p. 59).

The definition of "regulation" affords an interesting example of the luminous manner in which the subject is treated in this Brief (p. 21):

> "It (regulation) is only, simply, and cannot otherwise be described than *regulation* of rates for services rendered."

In other words, regulation is regulation.

The statement is several times repeated, that if a rate should be fixed which would permit only a reasonable return upon the capital actually invested, the special franchises would have no value (pp. 18, 28, 32); and this statement is forthwith demolished by a quota-

tion from Messrs. Beale and Wyman, which is made "because of the conciseness and intrinsic force of the statement" (p. 28).

"The vice" of the decision of the lower Court is attributed to the fact that a franchise was held to be synonymous with property (p. 21). "We are so accustomed to the collocation of property and franchise, in speaking of corporations, that we unconsciously come to treat the words as synonymous." In the very next sentence, the learned counsel give a striking illustration of this "collocation", by including in the phrase, "all property", the term, "franchise"; and, later (p. 31), it is asserted that "a franchise, whether general or special, is taxable *the same as other property*."

Having stated that a special franchise is no part of the investment of a gas company, counsel chance to remember that such a franchise must be paid for in condemnation proceedings; and they dispose of this awkward fact, by concluding that that does not add anything to the investment (p. 32). The Court of Appeals, however, differed from that conclusion, when it reversed the report of the Commissioners in the White Plains Water case (176 N. Y., 239). If the amount subsequently allowed for the special franchise and good will in that case was not part of the capital investment, to which the stockholders were entitled, to whom did it belong?

Many of the other erroneous contentions advanced in the lower Court, which have heretofore been commented upon, are brought forward in the present Brief; such as the confusion of terms in failing to distinguish between special and general franchises (p. 20), the gratuitous assumption that no consideration was given for the special franchises of the appellee (pp. 19, 24), the alleged insuperable difficulty in valuing special franchises (p. 22) etc.; and the counsel "take occasion to observe", impressively (p. 24), that "there are no rights of stockholders, as such, involved in this litigation or any aspect of it". The corporate entity is the real and only culprit and victim. The thousands of stockholders and bondholders, who are anxiously waiting to see whether their incomes from investments in public service corporations are to be cut down to a bare return upon the reproductive value of the tangible property alone, may possibly demur to this solemn observation of counsel.

PART II.

GOOD WILL, OR THE VALUATION OF THE PROPERTY AS AN ORGANIC WHOLE.

The Special Master included good will among the assets upon the value of which the Company was entitled to a return (Record, p. 205). The Court rejected this item; and its primary reason for so doing was because the ordinary legal definition of good will was not applicable to the Company's business (Record, p. 410). It is a case where a general principle has been summarily disposed of by a narrow and precise definition. But, as Mr. Chief Justice FULLER observed, in Metropolitan Bank v. St. Louis Dispatch Co. (149 U. S., 436, 446):

> "Undoubtedly good will is in many cases a valuable thing, although there is difficulty in deciding accurately what is included under the term."
>
> See, San Francisco Nat. Bank v. Dodge, 197 U. S., 93, 95.

I. It may be true that good will, in the strict mercantile sense, is somewhat of a misnomer as applied to public service corporations. But, in a broader sense, good will is a valuable property right, growing out of the successful establishment of a business, over and above the actual capital invested and employed in the business. In this sense, good will may be regarded as the momentum of a well established business in successful operation; and the value, in the case of a public service corporation, is more substantial and more permanent than that of the good will of a mercantile business. The good will of a manufacturing or mercantile establishment may be of great present value, but with no certainty of its continuance for any extended period. The article manufactured may cease to have any commercial value, through a caprice of fashion or because it has been superseded by another article more novel or serviceable, while the continuing prosperity of a mercantile establishment or business of any kind depends so largely upon the personal element that, in

estimating such good will, the courts have refused to consider that it has a value greater than the net profits of the business for two or three years.

1 Lindley on Partnership (5th Eng. Ed.), 447;
Mellersh v. Keen, 28 Beav., 453.

But, in the case of a gas business, the conditions inevitably make for greater permanence. Nothing is more certain than that large quantities of illuminating gas will continue to be used for many years to come; and this was expressly found by the trial Court, in limiting so strictly the allowance to be made for depreciation (Record, p. 407); and the merely *personal* element in the management of the business has very little to do with the use of gas.

Thus, the successful continuance of the appellee's business does not depend upon influences which are subject to sudden change. It depends primarily upon the existence of a long established business in a public necessity, and upon existing connections made with its vast army of consumers; and the longer this connection has existed and the greater the number of consumers, the greater will be their reluctance to have new connections made with an untried company, and the more substantial will be the value of the good will of the old company.

II. Judge HOUGH was of the opinion that "tangible property has a certain value entirely apart from franchise or right to continue business, or method of transacting business; but good will, in the sense of organization for the business of furnishing gas, can have no existence whatever apart or detached from the franchise conferring the necessary privilege" (Record, p. 111).

That view, so far as the tangible property is concerned, is at variance with the one expressed by the Court of Appeals in the Franchise Tax Cases (174 N. Y., 417, 424), as well as with those of this Court.

Gue v. Tidewater Canal Co., 24 How., U. S., 261.
State Railroad Tax Cases, 92 U. S., 575, 606.

That good will may not have any value apart from the franchises does not detract from its substantial character as property any more than it detracts from the substantial character of the manufacturing plant to say that its value is dependent upon the franchises.

Neither can it make any difference that the business may be a monopoly, though the record in this case shows the contrary. That is true, to some extent, of all public service corporations, and is the fundamental reason why they are subject to regulation by the legislature.

III. Judge HOUGH also expressed the opinion that the "most ingenious financier" would not think of capitalizing the good will of the gas business. But even if it were absolutely certain that the appellee had no franchises whatever or that all of its franchises would shortly expire, there is no doubt that the mere fact of having an established business, in active operation, would be of very great value. The municipal authorities would be extremely reluctant to compel the Company to remove its hundreds of miles of mains from the streets; and, by the very fact of the existence of those mains in the streets and their connection with the buildings along their line, the Company could afford to pay more for an additional franchise than any new company, which would require several years to construct its works and make its connections; and it cannot reasonably be doubted that if the Company were forced to retire from business and dispose of its manufacturing plants and mains, it could obtain for its property much more than the actual estimated profit of the business during the period required for the construction of new mains and connections. A new company, which purchased the business of the appellee with all its existing connections and the improvements and special facilities resulting from long experience, would have to pay for them and would, therefore, be forced to capitalize them.

There is no greater difficulty in capitalizing this value than there is in capitalizing the good will of an ordinary mercantile bus-

iness. That is done every day; and it is an entirely proper thing to do. The only objection to it is that it is frequently abused by excessive capitalization. But that objection applies to patents and mining properties and indeed to property of every kind, in varying degrees.

IV. In New York (the law of which is controlling in this case), good will, or the added value derived from an established business, is property, which, in the case of a partnership, constitutes a partnership asset and does not pass to the surviving partner.

Slater v. Slater, 175 N. Y., 143.

But the New York courts have gone further and held, even in the case of a water works company (a public service corporation) that its good will must be paid for in condemnation proceedings.

Matter of White Plains Commissioners, 176 N. Y., 239.

V. In New York, under the system of taxation which exists, corporations are required to pay a state franchise tax, under which good will is taxable.

Tax Law, Sec. 182;
People v. Roberts, 154 N. Y., 101;

and, in the case of gas companies, they are required to pay one-half of one per cent. of their gross earnings, in addition to a sum dependent upon the rate of the dividend (Tax Law, Sec. 186); and, as the earning power is necessarily dependent upon the good will of the company and the extent to which its business has been established, this tax necessarily includes a tax upon the good will and other intangible property of the Company.

If good will is property for the purposes of taxation, it is necessarily property for every other purpose.

VI. In the opinion of the Court below, a conclusive reason for not allowing anything for the so-called good will of the Company was that the price of gas has for many years been regulated by law (Record, p. 411). For many years, the maximum rates charged by

railroad companies in New York has been regulated by law (L. 1848, Ch. 140, Sec. 30). Is there any doubt that the property of the New York Central and Hudson River Railroad Company has a value far beyond anything which could reasonably be attributed to its tangible property and special franchises? The same is true of all public service corporations and of all business affected with a public interest. It is just as applicable, for instance, to warehouses or grain elevators owned by *individuals* (Munn v. Illinois, 94 U. S., 113, Brass v. Stoeser, 153 U. S., 391, People v. Budd, 117 N. Y., 1), where there is no special franchise, as it is to the business of a public service *corporation*. But it would scarcely be claimed that an individual who had built up a valuable elevator business, as in the Budd case, could have his charges limited, without taking into consideration the value of the business as a whole, that is, the value of the good will, which, in such a case, where there was no special franchise derived from the state, would be the main element of value in the business.

A suggestion of that kind was thus answered by Mr. Justice BREWER, in Cotting v. Kansas City Stock Yards Co. (183 U. S., 79, 104):

> "Is it true, in this country, that one who by his attention to business, by his efforts to satisfy customers, by his sagacity in discerning the probable courses of trade, and by contributing of his means to bring trade into those lines, succeeds in building up a large and profitable business, becomes thereby a legitimate object of the *legislative scalping knife?*"

VII. It would be the application of the legislative knife to a more vital part than the scalp, if the legislature were permitted to regulate a business, either as it should be under ideal conditions, or as it would be if it were a mere lifeless aggregation of different pieces of property. What the legislature regulates, and all that it has the power to regulate, is a going business, one actually devoted to the public use, *an organic whole*; and it is the value of that whole, in active operation, which must be taken into account. This vital principle has been repeatedly recognized by this Court, in its reference to "present" value, that is, value under the conditions

which actually exist when the regulation is attempted and not under conditions which might possibly exist in Utopia. The regulation of rates in New York City must depend upon values as they exist at that place, not as they exist in some other part of the country. The value of any manufacturing plant depends largely upon whether it is in successful operation. An artificial gas plant might be rendered worthless, if natural gas were found in the vicinity in sufficient quantity to make it impossible to supply artificial gas in competition.

The present record shows that the valuation placed upon the real estate and plant of the Company was merely the market or reproductive value. Nothing was allowed for the fact that all of this property has a largely enhanced value by reason of the fact that it is operated as a single entity, although the parts are physically separated. It is the great value of this business as an organic whole, and not the nominal value of its dismembered and lifeless parts, upon which its owners are entitled to a return; and that principle is universally recognized in assessing property for taxation.

Cleveland, &c., Ry. Co. v. Backus, 154 U. S., 439;
Express Company Cases, 166 U. S., 171, 185;
Western Union Tel. Co. v. Gottlieb, 190 U. S., 412;
Fargo v. Hart, 193 U. S., 490;
San Francisco Bank v. Dodge, 197 U. S., 70.

1. In Cleveland etc. Ry. Co. v. Backus, the Court said (p. 444):

> "The true value of a line of railroad is something more than an aggregation of the values of separate parts of it operated separately."

2. In the Express Company cases, Mr. Justice BREWER said (p. 219):

> "Now whenever separate articles of tangible property are joined together, not simply by a unity of ownership, but in a unity of use, there is not infrequently developed a property, intangible though it may be, which in value

exceeds the aggregate of the value of the separate pieces of tangible property."

And he further said (p. 221):

"But if the State comprehends all property in its scheme of taxation, then *the good-will* of an organized and established industry must be recognized as a thing of value. The capital stock of a corporation and the shares in a joint stock company represent not only the tangible property but also the intangible, including therein all corporate franchises and all contracts, privileges *and good-will* of the concern."

And he further said (p. 222):

"The value which property bears in the market, the amount for which its stock can be bought and sold is the real value. Business men do not pay cash for property in moonshine or dreamland."

3. In Fargo v. Hart, the Court, in an opinion written by Mr. Justice HOLMES, said (p. 499):

"The sleepers and rails of a railroad, or the posts and wires of a telegraph company are worth more than the prepared wood and the bars of steel or coils of wire, from their organic connection with other rails or wires and the rest of the apparatus of a working whole. This being clear, it is held reasonable and constitutional to get at the worth of such a line, in the absence of anything more special, by a mileage proportion. The tax is a tax on property, not on the privilege of doing the business; but it is intended to reach the intangible value due to what we called the organic relation of the property in the State to the whole system."

4. In San Francisco National Bank v. Dodge, in the dissenting opinion in which four of the Justices participated, it was expressly recognized (pp. 93, 95) that good will is a property right, protected by the Constitution; and there was apparently no difference of opinion on this point in the case of the other Justices.

VIII. A similar conclusion has been reached by the Federal Courts in rate regulation and other cases.

National Water Works Co. v. Kansas City, 62 Fed. Rep., 853, 865;

Metropolitan Trust Co. v. Houston etc. R. Co., 90 Fed. Rep., 683, 687;

Spring Valley Water Works v. San Francisco, 124 Fed. Rep., 574, 595.

1. In National Water Works Co. v. Kansas City (62 Fed. Rep., 853, 864), Mr. Justice BREWER said:

"On the other hand, the city insists that the franchise has ceased and that basing the value upon earnings is in effect valuing a franchise which no longer exists, and which the city is not to pay for; that the true way is to take the value of the pipe, the machinery, and real estate, put together into a water works system, as a complete structure, *irrespective of any franchise*—irrespective of anything which the property earns or may earn in the future. * * * The original cost of the construction cannot control, for 'original cost' and 'present value' are not equivalent terms. *Nor would the mere cost of reproducing the water works plant be a fair test, because that does not take into account the value which flows from the established connections between the pipes and the buildings of the city.* It is obvious that the mere cost of purchasing the land, constructing the buildings, putting in the machinery, and laying the pipes in the streets—in other words, the cost of reproduction—does not give the value of the property as it is to-day. A completed system of waterworks, such as the Company has, without a single connection between the pipes in the streets and the buildings of the city, would be a property of much less value than that system connected, as it is, with so many buildings and earning, in consequence thereof, the money which it does earn. The fact that it is a system in operation, not only with a capacity to supply the city, but actually supplying many buildings in the city,—not only with a capacity to earn, but actually earning,—makes it true that 'the fair and equitable value, is something in excess of the cost of reproduction.' The fact that the company does not own the connection between the pipes in the streets and the buildings—such connections being the property of the individual property owners—does not militate against the proposition last stated; for who would care to buy, or at least give a large

price for, a waterworks system, without a single connection between the pipes in the streets and the buildings adjacent. Such a system would be a dead structure, rather than a living and going business. The additional value created by the fact of many connections with buildings, with actual supply and actual earnings, is not represented by the mere cost of making such connections. Such connections are not compulsory, but depend upon the will of the property owners and are secured only by efforts on the part of the owners of the waterworks, and inducements held out therefor. The city, by this purchase, steps into possession of a waterworks plant—not merely a completed system for bringing water to the city and distributing it to pipes placed in the street, but a system already earning a large income, by virtue of having secured connections between the pipes in the streets and a multitude of private buildings. It steps into possession of a property which not only has the ability to earn but is in fact earning. It should pay, therefore, not merely the value of a system which might be made to earn, but that of a system which does earn."

2. In Metropolitan Trust Co. v. Houston etc. R. Co. (90 Fed. Rep., 683), Judge McCormick gave expression to the same idea, in holding that, in estimating the value of a railroad, its favorable location should have been considered, in view of the advance in prosperity of the country through which it ran, as well as " the increment of its value due to the settling, seasoning and permanent establishment of the railways and to the established business and the good will connected with its business, which has been established through a long series of years and all of which should reasonably be considered in fixing the value of the property and the capitalization upon which at least it is entitled to earn and to pay some return."

It is an elementary economic truth, which has been recognized by this Court (San Diego Land Co. v. National City, 174 U. S., 739, 757) that, in any form of business enterprise, a return must be allowed for the services of those who engage in it, as well as upon the capital actually employed. What return shall be permitted for such services is dependent upon their

value, and a test of the value is the result accomplished. If the value of the services is great, the capital employed and the property used has an added value, which, for lack of a better term, may be called good will, and which is universally recognized as one of the most valuable assets of a successful business. An enterprising man may build up an elevator business so successfully, that, in course of time, it is patronized to such an extent by the public as to become "affected with a public interest." To "regulate" his business, by allowing him a return only upon the actual value of his land and plant, without considering its value as an organic whole, would be to rob him possibly of the rewards of a lifetime of intelligent effort and successful achievement.

What is the value of the tangible property of an express company, compared with the value of its business as a going concern? Would anyone seriously contend that an express company would receive a reasonable return from its business, if the legislature merely permitted a return upon the value of its horses, wagons and office furniture?

Upon the theory which the appellants seek to establish in this case, all business must first be brought to a standstill, in estimating the value of the investment. If that theory should be accepted, it would require no prophetic vision to foresee the time when legislative zeal would cause the abandonment by individuals of all forms of enterprise affected with a public interest, leading inevitably to the assumption of such business by the state.

PART III.

THE APPELLEE POSSESSES SPECIAL FRANCHISES.

FIRST.

Every presumption in favor of the appellee's rights.

I. The Appellee owns 822 miles of mains in the streets of New York, through which it supplies about 13,000,000,000 cubic feet of gas every year to nearly 400,000 consumers; and it has been engaged in this business continuously since 1884. Prior to that date, its constituent companies, the earliest of which reached back to 1823, had been engaged in the same business. To carry on this business properly and to maintain its mains in good condition, make needed repairs, supply new connections and provide further extensions as the service was extended into a wider territory, required the continual opening of the streets. But before any opening can be made in a street, special permission to make it must first be obtained, as required by the City Charter (Sec. 528):

> "It shall be unlawful, after the passage of this Act, for any person or corporation to take up the pavement of any of the streets, avenues, highways or other public places of said city * * * unless permission in writing therefor shall have been first obtained from the said Commissioner of Water Supply, Gas and Electricity, with the written approval of the President of the Borough within which it is desired to lay such conduits."

The City is thus continually giving to the Company its consent to open the streets in connection with its business; and this course of dealing has been going on from time immemorial. The Court will certainly not assume that all of those who now represent and for so long a period have represented the City in these matters, have been derelict in the performance of their duty, especially since

the new Charter took effect in 1898, establishing the definite policy that no new franchise shall be consented to without some consideration, and then only for a limited period.

City Charter, Secs. 73, 74.

II. Moreover, if, as the appellants contend, the appellee has a monopoly in the City of New York, the Legislature has, in the Acts complained of, regulated the business of the appellee and thus recognized the existence of its right to occupy the streets.

Owensboro v. Owensboro Waterworks Co., 191 U. S., 358; Southern Pacific Co. v. Board of Railroad Commissioners, 78 Fed. Rep., 236, 251 (McKenna, J.).

In Owensboro v. Owensboro Waterworks Co., Mr. Justice McKenna, in delivering the opinion of the Court, said (p. 372):

> "*The appellee is in possession of the waterworks, and is supplying the inhabitants of the city with water.* It is that service which the city desires to regulate, and it is to "every person, firm, company and corporation" engaged in that service the ordinance of March 21, 1900, is addressed. No other person, firm or corporation than the appellee is so engaged in Owensboro, or has been so engaged for some years. *We do not think the legality of the ordinance can be questioned or measured by either the company or the city by the defects or perfections of the title of the company to its franchises or property.*"

In their Brief filed in this Court, counsel for the Public Service Commission, which has special jurisdiction in those matters, concede that the appellee possesses special franchises (*ante*, p. 62).

SECOND.

Question of actual existence and duration of special franchises unimportant.

The New York City Charter (Secs. 73, 74), providing for the purchase of special franchises, gives every public service corporation the right to acquire such franchises upon the payment of a

sum to be fixed by the proper authorities. If, therefore, the Consolidated Gas Company does not now possess any franchises, as is contended by the appellants, it can readily acquire them by paying for them. Section 69 of the Public Service Commissions Law (L. 1907, Ch. 429) permits the capitalization of the amount thus paid:

> "The Commission shall have no power to authorize the capitalization of any franchise to be a corporation or to authorize the capitalization of any franchise or the right to own, operate or enjoy any franchise whatsoever in excess of the amount (exclusive of any tax or annual charge) actually paid to the state or to any political subdivision thereof as the consideration for the grant of such franchise or right."

If the Company should now acquire special franchises by paying for them, the sum fixed by the municipal authorities would probably not be less than the valuation which has been placed upon the franchises by the State Board for the purposes of taxation. The consumers would thus be obliged to pay a price for the gas supplied by the Company which would permit a return upon this capitalization. The insistence of counsel for the appellants, that the Company does not possess any special franchises is, therefore, difficult to understand; because, if such were the case, the consumers would be no better off and possibly not so well off; for if the Company were now required to purchase its special franchises from the City, the amount paid might be larger than the valuation which has been placed upon them in this case, inasmuch as the assessed valuation by the State Board is greater than that found by the Court.

THIRD.

Special franchises from acquiescence.

I. The franchise to lay mains is derived from the state and not from the municipality, though its exercise is, of course, subject

to reasonable control, supervision and regulation by the local authorities, as part of their general police power.

Barhite v. Home Telephone Co., 50 App. Div., 25, 32;
Rochester v. Bell Telephone Co., 52 App. Div., 6, 9;
People *ex rel.* Nassau Electric Lines v. Squire, 107 N. Y., 593.

II. The legislature has absolute and exclusive control of the streets of the cities and villages of the state. All franchises or rights in the streets have their source in the sovereign power. The municipalities have only such control (aside from the ordinary police regulations for the use of the streets) as is *expressly* conferred upon them by the legislature.

Dillon on Municipal Corporations (4th Ed.), Sec. 89, 680;
Milhau v. Sharp, 27 N. Y., 611;
Rhinehart v. Redfield, 93 App. Div., 410, 413; affd. 179 N. Y., 569;
Potter v. Collis, 156 N. Y., 16, 30;
Matter of White Plains Commissioners, 176 N. Y., 239;
Carthage v. Central N. Y. Tel. Co., 185 N. Y., 448;
Paige v. Schenectady Ry. Co., 178 N. Y., 102, 115;
Detroit v. Detroit Citizens Street Ry. Co., 184 U. S., 368, 382;
Blair v. Chicago, 201 U. S., 400, 457, 492.

III. In New York, the only statutory power conferred upon municipalities, in the case of gas companies, is to give their consent to the exercise of the legislative authority to lay mains for the purpose of carrying on the business of manufacturing and supplying gas. That is, of course, a very important power, the exercise of which is essential before the legislative authority can take effect.

Ghee v. Northern Union Gas Co., 158 N. Y., 510, 512.

But no particular method of giving the consent is prescribed by the legislature. It need not even be in writing. Any such conduct on the part of the municipality as is equivalent to

acquiescence in the use of the streets by a corporation having the legislative authority will be held to constitute the statutory consent.

People *ex rel.* N. Y. & Richmond Gas Co. v. Cromwell, 89 App. Div., 291;
People *ex rel.* Brooklyn Union Gas Co. v. Littleton, 110 App. Div., 728, 729;
Wakefield v. Village of Theresa, 125 App. Div., 38 (1908).

1. In the case of the New York and Richmond Gas Company, a gas company had been organized under the general Act of 1848, which conferred full power upon such corporations to manufacture and sell gas and "to lay conductors for conducting gas through the streets, lanes, alleys and squares in such city, village or town, *with the consent of the municipal authorities of said city, village or town* and under such reasonable regulations as they may prescribe." A corporation had been organized, in 1856, under that Act, and the Company had been engaged for nearly half a century in supplying gas to the inhabitants of the town specified in the certificate of incorporation. In 1903, the municipal authorities refused to grant permission to the successor of this company to lay mains in certain streets not previously occupied. Upon application to the court, a peremptory writ of mandamus was issued, requiring such permission to be given, although it was not shown that there had ever been any formal consent on the part of the municipal authorities to lay the mains. The court held that such authority would be implied from the acquiescence of the local authorities in the conduct of the business of the company; and it reached this conclusion, on the ground that authority to lay conductors was conferred by the general gas Act, above quoted, which did not prescribe the form of the local consent or even require it to be in writing, and that the consent could, therefore, properly be inferred

from the failure to object. In reaching this conclusion, the court followed the principle recognized by the Court of Appeals, in Jennings v. Van Schaick (108 N. Y., 530, 532), where it was held proper to infer municipal permission to construct an opening in the sidewalk from an acquiescence of eighteen years, without objection.

2. The principle recognized in the New York and Richmond Gas Company was followed in the case of the Brooklyn Union Gas Company, *supra*.

3. In Wakefield v. Village of Theresa, a contract had been entered into between the Village and certain individuals, whereby the privilege of occupying the streets with wires and poles for electrical lighting was granted, for a period of five years, with privilege of renewal. After the expiration, in 1900, of the five years, there was no formal renewal but the business was continued and extended. Subsequently, in 1906, the Village determined to construct a lighting plant of its own, and notified the owners of the private lighting plant to remove their poles and wires from the streets. Held, that this could not be done, owing to the acquiescence on the part of the Village. In regard to this, the Court said (p. 42):

> "It is claimed that the privilege expired in 1900 by the terms of the contract. The plaintiffs did not become vested with the title to the plant until 1903, and it was then in operation with the acquiescence of the defendant. They equipped the plant, adding to it materially, and the claim was not then made that a renewal of the contract was essential to give validity to the privilege of keeping the poles and wires in the streets. The contract contemplated the extension of the franchise beyond the five year period, unless the municipality elected to purchase the appliances. In a rather loose way, and yet with the approval of all parties, the plaintiffs have continued to avail themselves of their franchise, from year to year, without any formal renewal. Consequently, it is too late now for the defendant to make the omission to renew the agreement a ground for impeaching its validity, or to claim that the plaintiffs are in the streets unlawfully."

The same principle is recognized in other States.

Altanta v. Gate City Gas Light Co., 71 Ga., 106;
Spokane City R. Co. v. Spokane Falls, 6 Wash., 521, 33 Pac., 1071;
Commercial Elec. L. & P. Co. v. Tacoma, 17 Wash., 661, 50 Pac., 592;
Chicago v. Union Stockyards Co., 164 Ill., 224.

FOURTH.

The possession of the special franchises will be inferred from their assessment for taxation.

The mere fact that the special franchises of the appellee have been assessed by the State Board necessitates the conclusion that it possesses such franchises; because, if it were occupying the streets without due authority, it would have no franchise which could be made the subject of assessment.

People *ex rel.* Retsof Mining Co. v. Priest, 75 App. Div., 131; affd. 175 N. Y., 511.

FIFTH.

Special franchises perpetual.

In New York, a special franchise is perpetual, unless its duration is expressly limited by the consent or grant conferring it.

Davis v. Mayor, 14 N. Y., 506, 532;
Milhau v. Sharp, 27 N. Y., 611, 620;
People v. O'Brien, 111 N. Y., 1, 38, 40;
Miner v. N. Y. Centl. etc. R. Co., 123 N. Y., 242, 249;
Roby v. N. Y. C. H. R. R. R. C., 142 N. Y., 176, 180;
Trustee of Southampton v. Jessup, 162 N. Y., 122, 127;
Rhinehart v. Redfield, 93 App. Div., 410, 414; affd. on opinion below, 179 N. Y., 569.

I. In Davis v. Mayor, where there was no limitation upon the duration of the special franchise granted by the municipality, which had no power to grant a franchise in perpetuity, the Court said, per COMSTOCK, J. (p. 532):

> "These rights are in effect granted in perpetuity, because the only provision for their termination is in case the associates, after ten years, shall decline to pay such license fees 'as the corporation, with the permission of the legislature, shall prescribe.'"

II. In Milhau v. Sharp, the Court, per SELDEN, J., said, with reference to a similar franchise, in holding that it was perpetual (p. 620):

> "I say *perpetually*, because there is no limitation in point of time to the continuance of the franchise, and no direct power is reserved to the corporation to terminate it. * * * The title to the rails, when permanently attached to the land, and such right in the land as may be requisite for their *perpetual* maintenance, are, therefore, granted to the defendants by the resolution."

III. In People v. O'Brien, the Court said (RUGER, Ch. J.), with respect to a similar franchise (p. 38):

> "Grants similar in all material respects to the one in question have heretofore been before the courts of this state for construction, and it has been quite uniformly held that they vest the grantee with an interest in the street, *in perpetuity*, for the purposes of a street railroad."

And again (p. 40):

> "We are, therefore, of the opinion that the Broadway Surface Railroad Company took an estate *in perpetuity* in Broadway, through its grant from the city under the authority of the constitution and the act of the legislature."

Counsel for the Public Service Commission attempt to break the force of the decision in People v. O'Brien, by asserting that the remarks of Chief Judge RUGER in that case were purely *obiter*, because it was not necessary for the court to hold that the franchise

granted was perpetual. The statement quoted, however, expresses the view of the law on the subject which had been entertained by the most eminent jurists of the State. But the point was directly involved in the Broadway case. The whole question at issue was whether the special franchise of the Company, the duration of which was not specified in the grant (p. 39), expired with the life of the corporation. If it was the legislative intention, in granting the franchise without any limitation as to the time, to confine it to the life of the corporation, manifestly, with the cessation of that life, the special franchise would also cease to exist. But the Court unanimously concluded that the special franchise was not limited by the life of the corporation. There was no possible ground for contending that it was limited for a definite term of years, and the Court (p. 41) scouted the idea that it was a mere license or tenancy at will, terminable on notice. Therefore, in asserting that the special franchise was perpetual, the Court directly passed upon the vital point in the case.

Counsel for the Public Service Commission assert that the conclusion of the Court on the question of the perpetual character of the franchise was not concurred in by the majority of the Court, because two Judges (ANDREWS and EARL, JJ.) "concurred upon grounds separately stated." All of the Judges who took part in the case (including DANFORTH and FINCH, JJ.) did concur with the Chief Judge; and the grounds "separately stated" by ANDREWS and EARL, JJ., assume (p. 65), as their fundamental premise, the correctness of the statement of the Court (p. 40), that the Railroad Company "took an estate in perpetuity in Broadway."

SIXTH.

Duration of special franchises not affected by life of the corporation.

The mere fact that the life of a corporation to which a special franchise is granted is limited, does not limit the franchise itself.

People v. O'Brien, 111 N. Y., 1, 41;
Miner v. N. Y Cent. etc. R. Co., 123 N. Y., 242, 249;
Detroit Citizens Street Ry. Co. v. Detroit, 64 Fed. Rep., 628, 635 (C. C. A.);
Detroit v. Detroit Citizens Street R. Co., 184 U. S., 368, 394.

Blair v. Chicago (201 U. S., 400) is relied upon as an authority holding that where the duration of a corporate franchise is not specified, it is presumed to be limited to the life of the corporation. But this Court distinctly held in that case (p. 481), in referring to a number of similar ordinances, all of which were expressly limited to twenty-five years, with a single exception, that it would presume that the intention had been to limit all in the same manner. It was the case of the recognition of the principle, *noscitur a sociis*. And as to the ordinances of another municipality, the Court (p. 488) merely followed the law of Illinois on the subject. In New York, a different view is entertained.

Even though the life of a corporation may be limited by the original charter or certificate of incorporation, the term of the corporate existence may be extended.

Gen. Corp. Law, Sec. 32;
L. 1867, Ch. 937;

and in the case of a public service corporation, whose business grows more valuable with the passage of time, it will be presumed that such extension will be made.

Miner v. N. Y. C. etc. R. Co., 123 N. Y., 242.

In that case, the Court said (p. 249) :

> " While the life of the corporation was limited to fifty years, it could not have been expected that it should really cease to exist at the end of that period. While the legislature reserved the right to cut its life short, it also had the power to extend it. It is the experience of mankind that such quasi public corporations never come to an end by mere effluxion of time. A railroad corporation which had, during fifty years, rendered public service and properly discharged its corporate functions, would, with the passage of years, become more and more useful and more and more a necessity."

A similar view was taken by this Court, in

Union Pacific R. Co. v. Chicago etc. Ry. Co., 163 U. S., 564, 592.

Counsel for the appellants attempt to distinguish the Miner case, on the ground that railroad companies must acquire the fee to their right of way, and their tracks are more securely attached to the land than gas mains. But it is not true that railroad companies must acquire the fee, in condemnation proceedings. They should properly take only such interest as is necessary for their purposes.

Sixth Ave. R. Co. v. Kerr, 72 N. Y., 330, 332-3.

And to assert that the tracks of a railroad company are of a more permanent character, because more securely attached to the realty, than the mains of a gas company, which are buried under paved streets, is to make light of the facts.

SEVENTH.

Special franchises assignable.

It is the settled law of New York that franchises are assignable.

People v. O'Brien, 111 N. Y., 1, 40 ;
Parker v. Elmira, C. & N. R. Co., 165 N. Y., 274 ;

and the title may be transferred, even by a voluntary assignment, to an individual, and by him to a corporation.

Matter of Long Acre El. L. & P. Co., 188 N. Y., 361.

This Court has held that, in the absence of a statutory prohibition, such franchises are assignable.

New Orleans etc. R. Co. v. Delamore, 114 U. S., 501.
See also, Gue v. Tidewater Canal Co., 24 How., 257.

EIGHTH.

The special franchises of the Company.

Under the Act of 1884, all the franchises of the six constituent Companies passed to the appellee (L. 1884, Ch. 378, Sec. 5), whose corporate existence will not expire until 1934 (Record, p. 4820).

The Companies, in the order of their incorporation, were as follows :

The New York Gas Light Company (1823) ;
The Manhattan Gas Light Company (1830) ;
The Metropolitan Gas Light Company (1855) ;
The Harlem Gas Light Company (1855) ;
The Municipal Gas Light Company (1874) ;
The Knickerbocker Gas Light Company (1876).

Inasmuch as the franchises of all the Companies were merged into one company, it is not important to consider the validity of each, if the right to occupy the streets with its mains is possessed by the Company under one or more special franchises. A single company needs but one franchise. The duplication of franchises is, therefore, immaterial, in considering the right of the appellee to occupy the streets ; and the court below deemed it unnecessary to pass expressly upon the findings of the Special Master with respect to any of the franchises except those of the Harlem

and Knickerbocker Companies, which it found were "sufficient to meet all its requirements" (Record, p. 432). Inasmuch, however, as the Master's Report was confirmed, except where otherwise expressly indicated (Record, p. 430), the finding of the Master, that the New York, Manhattan and Metropolitan franchises were existent and perpetual (Record, pp. 195, 197), was not disturbed.

NINTH.

The Harlem Franchise.

The franchise of the Harlem Gas Light Company was unlimited in time and embraces all that portion of the City north of 79th Street.

I. The appellants contend that because the corporation was organized for only fifty years, therefore, the franchise was limited to the corporate existence. As we have already seen (*ante*, p. 88), that is not the law.

II. The consent granted by the City authorities contained the following provision (Record, p. 5093):

> "THIRD: The Mayor, Aldermen and Commonalty of said City hereby reserve the right to purchase, at any time, from the said Company, all the materials, pipes, fixtures, buildings and all and singular all the personal and real property owned by said Company, by paying to the said Company the cost of the same, and ten per cent. over and above said cost."

The appellants contend that, as the City can exercise this right at any time, the franchise of the Company is terminable at will, and has, therefore, no value for the future. This conclusion would not be correct even if the premise were sound, as there is no proof that the City is now committed to the doctrine of municipal ownership

and operation of gas plants, or is ever likely to be; and, as no special legislative authority has been conferred upon the City to engage in the gas business, it has no power to purchase a gas manufacturing plant.

Matter of White Plains Commissioners, 176 N. Y., 239, 251.

The entire provision above quoted is, however, an absolute nullity; because no power to make it was conferred by the Legislature; and it makes no difference that the Company may have expressly entered into a contract which imposed such condition.

Beekman v. Third Ave. R. Co., 153 N. Y., 144;
Potter v. Collis, 156 N. Y., 16;
Matter of White Plains Commissioners, 176 N. Y., 239.

This principle will be considered further, in discussing the Manhattan franchise (*post*, p. 103 *et seq.*).

The Harlem franchise thus clearly is perpetual and unlimited as to all that part of the City north of 79th Street. It would, therefore, certainly extend as far north as the Harlem River, that is, to Spuyten-Duyvil (220th Street); and there is no reasonable doubt that, with the enlargement of the City limits in 1873 (L. 1873, Chap. 613), and in 1895 (L. 1895, Ch. 934), the franchise extended to the Twenty-third and Twenty-fourth Wards, now forming the Borough of the Bronx.

People *ex rel.* Woodhaven Gas Light Co. v. Deehan, 153 N. Y., 528;
St. Louis Gas Light Co. v. St. Louis, 46 Mo., 121;
Grand Rapids v. Hydraulic Co., 66 Mich., 606;
Illinois Centl. R. Co. v. Chicago, 176 U. S., 646, 666.

The question involved is somewhat analogous to that once raised as to whether the Federal Constitution applied only to States in existence at the time of its adoption.

Town of Pawlet v. Clark, 9 Cranch, 292.

The Grand Rapids case (*supra*) is precisely in point. A water company was given a franchise to lay its pipes in the village of Grand Rapids. Subsequently, the village became a city, and its territory was enlarged. The city attempted to enjoin the Water Company from using the streets of the additional territory. The application was denied. The Court said (p. 612):

> "It is claimed that the village has ceased to exist and the defendant's privileges fell with it. It is also claimed that if this is not so, defendants are confined to the land covered by the village. * * * It has never been supposed that a city or any other public corporation changed its rights or its identity by gaining or losing territory. The same principle has been applied to the relations of special corporations which are connected with city arrangements, whether educational or for business purposes, and no new legislation is generally needed to adjust their new relations. This is illustrated in Trustees of Erie Academy v. Erie, 31 Pa. State 515, and in St. Louis Gas Lt. Co. v. St. Louis, 46 Mo., 121; the latter case being one relating to a supply of gas. * * * Had the village remained a village and been enlarged, the question would hardly have been raised. * * * If the charter had been granted a year after, instead of a year before the village became a city, it would not be reasonable to construe it as referring to then existing boundaries. There is no more reason for doing so now."

The mere extent of the territory annexed is immaterial. If only a few lots were annexed and an existing street were extended through them, no one would think of questioning the duty of a gas company occupying the original street to furnish gas to the occupants of the additional lots. But if there is a duty, there is a reciprocal right; and the principle would necessarily be the same if the additional territory comprised several blocks or an entire ward instead of a few lots.

In order to guard against the application of this well recognized legal principle, it was expressly provided in the Greater New York Charter (which took effect January 1, 1898), that no franchise previously granted should be extended by the enlargement of the City but should be confined to the existing territory.

City Charter, Sec. 1538.

The Harlem franchise is thus perpetual and unlimited in that part of the City where the greatest increase of population will necessarily take place.

TENTH.

The Knickerbocker Franchise.

At the time of the consolidation, the Knickerbocker Company owned two franchises, one known as the "State Grant" and the other as the "Anthracite" franchise.

I. The State Grant.

This was a direct and perpetual grant by the State to various individuals, giving them an unlimited right to manufacture and sell gas and to lay mains in that part of the city north of 79th Street (Complt's. Ex. 119, p. 5119).

L. 1871, Ch. 944.

The rights thus granted were, by various mesne assignments, vested in The Knickerbocker Company in 1876 (Complt's. Exs. 112-114, 116, 119-215; Record, pp. 5105-5110, 5113-5115, 5119-5254).

The appellants objected to many of these assignments, on the ground that there were technical defects in their execution. But such assignments are not required to be recorded, nor are they required to be in any particular form; and it is not necessary that they should even be in writing. There is no evidence in the case that the individual grantees claim any interest in the grant as against the appellee.

The conclusion of the Special Master was, therefore, properly confirmed by the Court, that, under the State Grant, the Company acquired a perpetual right to lay and maintain its mains north of

79th Street (Record, p. 432); and, in view of the lapse of time during which the Company has been in undisputed enjoyment of this franchise, this Court will be reluctant to disturb a finding of fact made after full consideration of all the evidence on the subject.

Thus, under both the Harlem franchise and the State Grant, the Company has a perpetual right to lay mains anywhere above 79th Street.

II. The Anthracite grant.

The Anthracite Gas Lighting and Heating Company was organized in 1863, under the General Manufacturing Act of 1848, for a period of fifty years (Complts. Ex. 107, Record, p. 5097). In June, 1863, the City duly gave its consent to the Company to lay mains *in all the streets*, for the period of fifty years, that is, until 1913 (Complts. Ex. 106, Record, p. 5095).

The validity of this franchise is attacked, on the ground that, as the Anthracite Company was organized under the General Manufacturing Act, and not under the General Gas Act of 1848, the City had no power to allow the Company to use the streets.

But the Company was empowered by the Legislature, under the General Manufacturing Act, to manufacture and sell gas in the City of New York and to purchase, hold and dispose of real and personal property (Chap. 40, L. 1848; Record, p. 5097). If the City, which owned the fee of the streets, chose to permit the Company to lay conduits in the streets for the purpose of delivering the gas, no one but the State could object, and such objection could be taken only in a direct proceeding instituted for the purpose.

Starin v. Edson, 112 N. Y., 206, 215;
Matter of Long Acre El. L. & P. Co., 188 N. Y., 361, 367.

Whatever force the objection may ever have had has been entirely removed by the recent decision of the Court of Appeals in the Long Acre case (*supra*), where the point now urged by the appellants was definitely passed upon. In that case, the American Electric Manufacturing Company was organized under

the General Manufacturing Act of 1848 (188 N. Y., 368). The City conferred upon that Company the right to use the streets; and this right was voluntarily assigned to an individual, and, by various mesne assignments, became vested in the relator, the Long Acre Company. It was contended on behalf of the respondent that the relator had not shown any legislative authority to use the streets. The Court of Appeals, however, held that, as, under the Manufacturing Act of 1848, corporations had power to purchase, hold and convey real and personal property, and as the right granted by the City was property, it could dispose of that property even to an individual. In the present case, therefore, the Anthracite Company had the undoubted right to assign the franchise granted to it; and, by various mesne assignments, the franchise passed, in 1876, to the Knickerbocker Company (a corporation formed under the general gas Act), and, through the consolidation, to the appellee.

Under the Anthracite franchise, the appellee, therefore, has the right to lay and maintain its mains, *throughout the entire City*, until 1913.

III. Between 1876 and 1884, the Knickerbocker Company, which, as above stated, was organized under the general gas Act, occupied the streets and carried on its business; and the Legislature recognized its right to enter into the consolidation of 1884 and to capitalize its franchises. Thus, both the City and the State recognized that it possessed franchises.

ELEVENTH.

The Manhattan Franchise.

While it is unnecessary to consider the validity of the Manhattan franchise, inasmuch as it merely duplicates the Harlem and Knickerbocker franchises, yet the right under that franchise is so clear that a brief reference to it will not be out of place.

The finding of the Special Master, that this franchise was owned by the appellee and was perpetual (Record, pp. 195, 197), was confirmed by the Court (Record, p. 430).

The Manhattan Gas Light Company was organized in 1830, and received a direct charter from the Legislature (Complt.'s Ex. 5, Record, p. 4830).

L. 1830, Ch. 59.

No limitation was placed upon the duration of its corporate existence. Its charter contained this language (Sec. 9):

> "This Act shall be deemed a public act and shall be benignly and favorably construed for the purposes therein expressed and declared in all courts and places whatsoever."

This express provision thus negatives the principle that, in construing a grant by the State, every intendment is to be taken in favor of the public and against the grantee, though that principle is never applicable unless there is ambiguity in the grant.

Trustees of Southampton v. Jessup, 162 N. Y., 122, 127.

There was granted to the Company "full power and authority" to manufacture and sell gas in the City of New York, "and to lay pipes for the purpose of conducting the gas in any of the streets or avenues of the said City" (Record, p. 4830). It was, however, provided, "that no public street, lane or highway in the City of New York shall be dug into or in any way injured or defaced without the permission of the corporation of said city first had and obtained."

The City gave its consent to the use of the territory between Grand and 42d Streets; and it attempted to limit the duration to the year 1868 (Record, p. 5085).

This attempted time limitation by the municipality was a nullity.

The authorities on the subject have already been considered, to some extent (*ante*, p. 92).

I. The legislative authority was a direct and present grant, complete in itself, unqualified and unlimited.

The grant to lay mains took effect at once, without requiring

any consent on the part of the municipality. The only proviso was that no streets should actually be dug into, that is, opened for the purpose of laying mains, without the permission of the City. In other words, the legislature intended to reserve to the City the right to determine whether any gas mains should be laid in a particular street or locality, and to prevent the duplication of mains in a street already occupied by the mains of another gas company; and it was doubtless because the City had previously given its consent to the occupation by the New York Gas Light Company of the streets south of Grand Street (Record, p. 5081), that it limited its consent, in the case of the Manhattan Company, to the territory north of Grand Street.

What was said by this Court, in New Orleans Waterworks Co. v. Louisiana Sugar Refining Co. (125 U. S., 18, 32) is in point:

> "The legislature itself thus defined the class of persons to whom, and the object for which, the permission might be granted. All that was left to the city council was the duty of determining what persons came within the definition, and how and where they might be permitted to lay pipes, for the purpose of securing their several rights to draw water from the river, without unreasonably interfering with the convenient use by the public of the lands and highways of the city. The rule was established by the legislature, and its execution only committed to the municipal authorities. The power conferred upon the city council was not legislative, but administrative, and might equally well have been vested by law in the mayor alone, or in any other officer of the city."

While the authority to lay mains in the streets of the city was directly conferred by the legislature, it was intended to permit the City to designate the streets in which it might be exercised, to control the physical opening of the various streets and avenues, from time to time, and to regulate the manner in which they should be opened.

II. That it was not intended to confer power upon the local authorities to impose conditions or to change the nature of the legislative grant appears more clearly by a reference to some of the

contemporaneous legislative grants, in which the language employed varies slightly but where the legislature evidently had precisely the same object in view, in each instance.

1. Thus, in the charter of the Albany Gas Light Company (L. 1833, Ch. 135), it was provided (Sec. 9) that the corporation should "conform to all reasonable regulations which may be made by the Mayor, Aldermen and Commonalty of the City of Albany as to the time and manner of laying their pipes and to prevent the works from becoming a nuisance."

2. The charter of the Buffalo Gas Light Company (L. 1856, Ch. 734) contained this provision:

> "But before digging up or removing *any* of the streets or avenues of the said city, the said corporation shall first give notice to and obtain the consent of the common council of said city for that purpose."

This assumes that the authority to lay the mains was granted by the State and that the company could proceed to lay its mains but before actually opening any particular street or avenue, it should first give notice to the municipal authorities and obtain their consent as to that street. In other words, the municipal consent did not apply to a general authority to occupy the streets, which might be given once for all; but the notice was to be given and the consent obtained every time that a new street or avenue was opened.

3. By L. 1841, Ch. 74, a charter was granted to a gas company to supply gas in Albany. Section 10 of the Act provided that it should not take effect until the municipal authorities had filed their consent to it with the Secretary of State. Obviously, the municipality could not vary the terms of the grant. It was merely given the power to say whether the Act, as passed, should take effect. It was a veto power, similar to that usually conferred upon the Governor of the

State as to bills passed by the legislature. While the Governor may approve a particular bill, he cannot, as a condition of his approval, vary the terms of the Act.

4. The same thing is illustrated in the charter of a Buffalo company (L. 1845, Ch. 254, Sec. 10), which provided that before commencing to lay conductors, the *assent* of the local authorities should be filed with the Secretary of State. It was also provided, by the same section, that the laying of the mains should be exercised in conformity with the regulations made by the common council; from which it is obvious that the control of the actual physical opening of the streets, from time to time, was vested in the local authorities.

5. The so-called State Grant, or franchise acquired by the Knickerbocker Company, contains a striking illustration of the same fact; as it was provided in its charter that it was not to be construed to authorize the laying of gas pipes within any territory under the control of the Department of Public Works, without the consent of that Department. That this refers merely to the physical act of laying the pipes is obvious, because the Board of Aldermen or Common Council, and not the Department of Public Works, exercise the legislative power of the municipality.

Ghee v. Northern Union Gas Co., 158 N. Y., 510.

6. In the very recent case of Carthage v. Central New York Telephone Co. (185 N. Y., 448), it was contended that the general Village Law, which conferred power upon villages "to regulate the erection of telegraph, telephone or electric light poles or the stringing of wires in, over or upon the streets or public grounds, or upon, over or in front of any building or buildings", was broad enough to make it competent for the village to compel the Telephone Company to place the extension of its existing lines in underground conduits. But the Court of Appeals said that there was no such implied power; and it clearly pointed out the distinc-

tion between the power to regulate and the power to impose conditions (p. 452):

> "It is clear that the intention of the legislature was to permit villages to regulate the erection of telegraph, telephone or electric light poles and the stringing of wires on these poles. The right to erect these poles and string the wires is not derived from the village authorities, but they are permitted to regulate the erection of the same, that is to say, the location of the poles and the streets to be occupied are doubtless within the reasonable power of the village to regulate".

This distinction was also pointed out in the Ghee case.

Ghee v. Northern Un. Gas Co., 158 N. Y., 510, 525.

The language of the Manhattan Charter makes it clear that what the Legislature intended was that every time the Company desired to lay its mains in a street not previously occupied, it should first obtain the permission of the local authorities. That has always been required, even in the case of companies which had expressly obtained the general consent of the City to the occupation of the streets.

City Charter, Secs. 469, 528;

and, prior to the present City Charter, the matter was regulated by municipal ordinance.

L. 1870, Ch. 137, Art. Third, Sec. 2, Subd. 5;
L. 1873, Ch. 335, Art. Two, Sec. 17, Subd. 5;
L. 1882, Ch. 410, Sec. 86, Subd. 5, Sec. 322.

III. The right to lay mains necessarily includes the right to use them for conducting gas, when laid. In other words, the phrase, "to lay," is a compendious one, which carries full authority to occupy the streets in the operation of the business. The law requires the mains to be maintained, after they have been laid; and any one injured by the failure to perform that duty has a good cause of action against the corporation.

14 Am. & Eng. Encyc. of Law, 936;
Siebrecht v. East River Gas Co., 21 App. Div., 110;
Washington Gas Co. v. District of Columbia, 161 U. S., 316, 325.

A gas company, being a public service corporation, is obliged to furnish gas to all consumers along its lines.

11 Am. & Eng. Encyc. of Law, 928;
Thornton on Oil and Gas, Sec. 525;

and this duty has been statutory in New York since 1859.

L. 1859, Ch. 319, Sec. 6;
Transportation Corporations Law, Sec. 65.

Having once laid its mains, under legislative authority, a gas company not only has the right to use and maintain them, but it is obliged to do so.

IV. It is noticeable that the same words, "to lay," are employed in the consent of the City, in the case of the Manhattan Company (Record, p. 5085), the words "use" or "maintain" not being employed; and that was so in the case of every consent granted by the City to any of the constituent Companies (Record, pp. 5092, 5094, 5095, 5116, 5119); and it is the language which has usually been employed in the case of all gas companies throughout the State, as appears in the charters of the Albany and Buffalo Companies, to which reference has heretofore been made (*ante*, pp. 99, 100).

Similar language was employed in the State Grant (Exhibit 119, Record, p. 5120), and is used in the Transportation Corporations Law with reference to gas companies (Sec. 61, Subd. 1) and waterworks companies (Sec. 82, Subd. 2). In the numerous charters granted to turnpike and bridge companies, the power granted is to "build" or "construct," the subsequent operation being implied.

L. 1830, Ch. 200;
L. 1830, Ch. 227;
L. 1830, Ch. 229;
L. 1830, Ch. 271;
L. 1831, Ch. 108;
L. 1831, Ch. 235;
L. 1831, Ch. 259;
L. 1831, Ch. 263.

And, in the Railroad Law, the authority conferred is to lay out and construct a railroad (Sec. 4, Subd. 3), nothing being said about

operating it subsequently; and similar language is employed in the Constitution of the State (Art. III, Sec. 18).

In the case of every grant of a franchise, whatever is required by necessary implication for its enjoyment passes with the grant.

Langdon v. The Mayor, 93 N. Y., 129, 151–2.

V. Where full and unlimited authority is conferred directly by the legislature upon a public service corporation, and there is no limitation in the grant, and no power is expressly given to the local authorities to impose conditions, the local authorities cannot limit the authority or prescribe terms or conditions upon which it may be exercised. In this respect, municipalities have no greater power than any other administrative body of the State.

1 Dillon on Mun. Corp., Sec. 55;
People *ex rel.* West Side Ry. Co. v. Barnard, 48 Hun, 63; affd. 110 N. Y., 548;
Gaedeke v. Staten Island R. Co., 43 App. Div., 514;
Dusenberry v. N. Y. etc. Traction Co., 46 App. Div., 267;
Wright v. Glen Telephone Co., 112 App. Div., 745;
Davis v. The Mayor, 14 N. Y., 506, 523–4;
People v. Kerr, 27 N. Y., 188;
Milhau v. Sharp, 27 N. Y., 611, 619–20, 622;
Matter of Kings Co. El. R. Co., 105 N. Y., 97;
Beekman v. Third Ave. R. R., 153 N. Y., 144, 152;
People *ex rel.* Woodhaven Gas Co. v. Deehan, 153 N. Y., 528;
Potter v. Collis, 156 N. Y., 16;
Ghee v. Northern Union Gas Co., 158 N. Y., 510;
Matter of White Plains Commissioners, 176 N. Y., 239;
Rhinehart v. Redfield, 93 App. Div., 410, 414–5; affd. on opinion below, 179 N. Y., 569;
Carthage v. Central N. Y. Tel. Co., 185 N. Y., 448;
Pittsburgh's Appeal, 115 Pa. St., 4;
Peoples Railroad v. Memphis Railroad, 10 Wall., 38, 50–52;
New Orleans Waterworks Co. v. Refining Co., 125 U. S., 18, 32;
Walla Walla v. Walla Walla Water Co., 172 U. S., 9.

1. In Pittsburgh's Appeal (*supra*), a case most carefully considered by the Court, after it had been argued by eminent counsel, the Court said (p. 21):

> "So far as the limited authority to legislate on these peculiar subjects" (opening streets) "has been delegated to Councils, *and to that extent only*, can the corporate powers, rights and privileges of natural gas companies be qualified or limited. Councils are authorized to give or withhold their assent without more. They have no right to couple their assent with any condition or restriction not imposed by the Act, unless the company agrees to accept the same and be bound thereby; and even then the conditions or restrictions so accepted by the company must harmonize and in no wise conflict with the provisions of the Act. The assent of councils being given, the regulations they are authorized to adopt are such only as relate to the manner of laying pipes, altering, inspecting and repairing the same, and the character thereof with respect to safety and public convenience. These regulations must also be reasonable and not in conflict with any of the provisions of the Act. In all other respects, the powers of such companies are clearly defined and their duties and liabilities prescribed by the Act under which they are incorporated."

That case was tried before Judge WHITE, whose decision was unanimously affirmed and whose opinion is given in full in the report of the case in the Supreme Court. Referring to the legal effect of the word "assent", Judge WHITE said (p. 12):

> "The word 'assent', in the 13th section, must be understood in its ordinary sense, as consenting or agreeing to. Something is stated or proposed to another; he assents to it, that is, accepts it, agrees to it. If he asserts or proposes something else, it is not assenting to what was asserted or proposed, but offering something else. A corporation with its charter under the Act of May 29th, 1885, comes to the city and asks consent to enter with its chartered rights and privileges. The statute says to the city: You may consent or not, as you please. It does not say you may refuse and then make the best bargain you can with the company. You may assent or dissent, that is all. If you assent, it must be with the rights the company has under the

statute, and you can do nothing more than ordain such reasonable regulations as are secured to you in the 11th section."

2. In Beekman v. Third Ave. R. R. (*supra*), a franchise was granted to a railroad company by the municipality, which, in addition to requiring the payment of a certain percentage of the gross receipts, as required by statute, also required the payment of a cash sum into the city treasury. This was not expressly authorized, *but the Company assented to it and agreed to make the payment.* Held, a nullity, as it was against public policy to permit a municipality to impose conditions which had not been expressly authorized by the legislature.

3. That an agreement to a condition which the municipality had no power to impose is a nullity was also expressly held in Potter v. Collis and Matter of White Plains Commissioners (*supra*).

The reason why such an agreement is a nullity was clearly stated in Town of Golconda (108 Ill., 419), where the Court said (p. 427):

"The complainants owned a ferry franchise, which they had a right to enjoy and use until they should commit some act which might authorize the State to interfere and forfeit the franchise. While in the enjoyment of this right, the act of 1859 was enacted by the legislature, which conferred a franchise for twenty years, but this act conferred no additional rights upon complainants. At the time the act was passed, they had, under the law of the land, all that the act of 1859 professed to confer, and much more, and we are unable to perceive how it is that complainants lost all rights held by them under the grant to Daniel Field in 1823, and confirmed by the act of 1827, by merely accepting the provision of the act of 1859. Suppose a certain person is in the possession of a tract of land under a regular chain of title from the government. Another person holds a tax title on the land, which the owner in possession buys, and obtains a a deed. Is the owner, when his title may be called in question, estopped from asserting title to the land from the government from the fact that he purchased an outstanding tax title and after the purchase occupied under

such title in connection with the original title? Surely not; and yet there is no substantial difference between the supposed case and the position of complainants. The complainants, when the act of 1859 was passed, were in the possession of the ferry franchise which had been conferred originally on Daniel Field, and descended to them. They had an undoubted right to hold and operate the ferry under the original grant. They did no act indicating an intention to abandon title to the ferry, but when the act of 1859 was passed, they accepted its provisions and held under it in connection with the original title. We do not think they waived any rights held under the original grant by accepting the provisions of the act of 1859, nor were they estopped from claiming under the original grant. If they thought the act of 1859 might strengthen their title to the ferry, we perceive no reason which would preclude them from accepting its provisions and at the same time retaining the original title held by them when the act of 1859 was passed."

4. In Dusenberry v. N. Y. etc. Traction Company (*supra*), the Court said (p. 270):

> "Where the legislature, in the exercise of its sovereign power, has regulated the subject matter, it is not competent for persons charged with the duty of giving their consent to the performance of a particular act to impose other or different conditions."

VI. While there are many decisions holding that a municipality may prescribe conditions and limit the period during which the authority conferred by the legislature may be exercised, it will be found that in every one of such cases, the authority granted by the legislature to the corporation was not immediate and absolute but that power was *expressly* conferred upon the municipality to prescribe the conditions under which the authority should be exercised. For instance, in People v. O'Brien (111 N. Y., 1), the Court recognized the right of the City to fix the duration of the grant (p. 38); but the Act in that case expressly imposed the duty on the City to prescribe conditions and give notice of the conditions prescribed before granting the consent.

L. 1884, Ch. 252, Sec. 7.

The same was true in the case of Blair v. Chicago (201 U. S., 400, 457–8) and in Louisville Trust Co. v. Cincinnati (76 Fed. Rep., 296).

The appellants contend that the mere fact that the consent of the municipality is required to the occupation of the streets, before a gas company can exercise the special franchise granted by the legislature, confers upon the municipality the power to impose terms and conditions and to limit the duration of the legislative grant and that otherwise the requirement of the municipal consent would be meaningless. But the evident purpose of the legislature was merely to confer a veto power upon the municipality and to permit it to determine for itself whether the streets should be occupied by any corporations other than those already in existence; in other words, whether the needs of the public had not already been fully supplied.

In the absence of express legislative authority, a municipality which does not own the fee of the streets has no greater power to grant the right to occupy the streets than the individuals whose property abuts on the streets. In the case of street railroad companies, the right to lay tracks in the city streets is derived from the legislature; but that right cannot be exercised without the consent of one-half in value of the adjacent property owners and of the municipality.

New York Constitution, Art. III., § 18.

In other words, it requires the consent of a certain proportion of the property owners before the company can exercise its franchises. The property owners are given a veto power and are permitted to determine (subject to review by the court) whether the streets shall be occupied for such purpose. But no one would contend that this veto power would permit the property owners to prescribe the terms and conditions upon which the streets shall be occupied or to limit the duration of the legislative grant.

VII. This Court has recently noted the distinction between the words "power" and "authority." The grant of power has often

been construed to mean nothing more than capacity to acquire a property right, not the acquisition of the right itself. "Authority," however, is the appropriate word by which an immediate right is conferred. In Blair v. Chicago (201 U. S., 400, 457), where full power to prescribe the terms and conditions of franchises had been expressly conferred on the municipality, the Court said:

> "The company must be 'authorized' by the city council before it can lay tracks or operate railways in the streets. This is more than to designate that for which authority has already been given. To authorize is to 'clothe with authority,' Webster's Dict.; 'to give legal power to,' Century Dict. It is an additional grant of right and power which the legislature requires the corporation to obtain as a condition precedent to its use and occupation of the streets."

In the case of the Manhattan Company, both power and authority are expressly conferred.

VIII. The practical construction which has been placed on the Manhattan franchise is conclusive as to its meaning and intent.

On the theory of the appellants, that the City had the right to limit the franchise which had been granted by the Legislature and that the Manhattan franchise, therefore, expired in 1868, manifestly that Company would have had no right to use the streets subsequently. As a matter of fact, however, its business was continued down to 1884, when it entered into the consolidation agreement with the other operating Companies. There was, therefore, a period of sixteen years when it was permitted to do business without objection. In other words, the municipal authorities conceded that the Company did have the right to occupy the streets; that is, they recognized the Company's right to continue its business, in spite of the attempted limitation to 1868; and they, therefore, properly treated that limitation as a nullity. This was a practical construction placed upon the Act by the parties affected by it, which would resolve any doubt the Court might have, if the question was one of first impression.

Power v. Village of Athens, 99 N. Y., 592, 601-2;
Des Moines Ry. Co. v. Des Moines, 151 Fed. Rep., 854, 861.

It is well settled, that the construction placed upon a statute by those upon whom rests a duty concerning it is entitled to great weight.

Cohens v. Virginia, 6 Wheat., 264 ;
Easton v. Pickersgill, 55 N. Y., 310, 315 ;
People v. Dayton, 55 N. Y., 367, 377 ;
Matter of Washington St. R. R. Co., 115 N. Y., 442, 447 ;

and where this has been long continued, the courts will recognize it as conclusive.

U. S. v. Hill, 120 U. S., 169, 180 ;
Robertson v. Downing, 127 U. S., 607, 613 ;
U. S. v. Alabama R. R. Co., 142 U. S., 615, 621.

IX. The existence of the Manhattan franchise subsequent to 1868 was expressly recognized by the Legislature.

The Act of 1884, under which the consolidation was effected, provided that the amount of capital of the consolidated company should not exceed " the fair aggregate value of the property, franchises and rights " of the consolidating companies (L. 1884, Ch. 347, Sec. 1) ; and the Senate Committee of 1886 found that, in assigning $7,781,000 for the franchises of the constituent companies, this restriction of the statute was not disregarded (Record, p. 5386). There was included in this item the sum of $2,329,000, allotted as the value of the Manhattan franchise, representing the proportion of the said $7,781,000 which the sales of the Manhattan Company bore to the total sales of all the consolidating companies (Record, pp. 186, 6418). Obviously, there would not have been any franchise of the Manhattan Company, if, as the appellants contend, that franchise had previously expired ; and the Legislature itself thus adopted the construction which had been placed upon the franchises by the Company and by the municipality.

TWELFTH.

The New York Franchise.

The finding of the Special Master, that the New York franchise was owned by the appellee and was perpetual (Record, pp. 195, 197), was confirmed by the Court (Record, p. 430).

The New York Gas Light Company was incorporated by a special Act of the Legislature in 1823 (Complts. Ex. 2, Record, p. 4826), with the right of "perpetual succession."

L. 1823, Ch. 85.

That Act also was required (Sec. X.), as in the case of the Manhattan franchise (*ante*, p. 97), to be "benignly and favorably" construed.

What has been said about the Manhattan franchise is applicable to the New York franchise, with the exception that the latter does not contain a specific grant of authority to lay mains. But the Company is authorized (Sec. I.) to manufacture and sell gas, "for the purpose of lighting the said city or the houses thereof and any buildings, manufactories or houses therein contained and situate."

The charter contains a proviso similar to that contained in the Manhattan Charter, that no streets should be dug into without the permission of the local authorities.

I. While the authority "to lay mains" is not expressly conferred by this New York charter, there can be no doubt that that is what the Legislature intended to grant.

In 1823, the use of gas for illuminating purposes was a novelty; and in granting a special charter to a company organized for that purpose, the Legislature evidently intended to give it full power to engage in the business of manufacturing and supplying gas, including the right to lay mains, under such reasonable regulations as to opening the streets as might be prescribed by the local authorities.

The Company was organized to manufacture and sell gas for lighting the buildings of the city, and, as it could not light the

buildings without conducting the gas through the streets to the buildings, the authority to lay mains was necessarily conferred. At that time, the City had no power to grant a franchise. It merely had the ordinary police power of regulation; and the provision was added, that the Company should not actually dig into the streets without first obtaining the permission of the City, so as to prevent the Company from claiming that the City had been deprived of its usual right to regulate the manner in which the streets should be dug into or opened, from time to time.

II. The authority conferred is expressly made perpetual, in providing that the Company should have the right to perpetual succession (Record, p. 4826).

III. For the reasons stated in discussing the terms of the Manhattan Charter, the local authorities had no power to limit the exercise of the franchise to thirty years. *But they did not attempt to do so.* They affirmatively consented to the occupation of all streets south of Grand and Canal Streets (Record, p. 5081); and as to this particular territory, they expressly conferred upon the Company the "*sole and exclusive* privilege and right" to lay mains for a period of thirty years. In other words, there was no attempt to limit the *general* right, but merely a limitation on the *monopoly* right to thirty years. While the Legislature had not conferred power to grant an *exclusive* right, it undoubtedly intended to ratify the exercise of the power by the City, when it subsequently granted the Manhattan Charter in 1830, the first section of which contained this provision (L. 1830, Ch. 59, Record, p. 4830):

> "But the rights and privileges hereby granted, shall not be construed to impair or affect any *exclusive* rights or privileges heretofore granted to any incorporated company in said city."

That could have had reference only to the New York Company, which was the sole incorporated gas company then engaged in business in the City.

Similar language, recognizing this exclusive right, was used in the Act incorporating the Metropolitan Gas Light Company (Record, p. 4853).

L. 1855, Ch. 545, Sec. 1.

IV. The City authorities openly conceded the right of the New York Company to occupy the streets of the city for thirty-one years after the expiration of this thirty year *exclusive* limitation ; and, as in the case of the Manhattan Company, the special franchise of the New York Company was valued at the time of the consolidation, in 1884, with the approval of the Legislature; the substantial sum of $1,417,000 being allowed for it (Record, pp. 186, 6418).

Moreover, in 1858, five years after the New York franchise had expired, as claimed by the appellants, the municipal authorities, in giving their consent to the Metropolitan Gas Light Company to occupy the streets, did so "subject to the same restrictions as to the mode of laying down said conductors as apply to and govern the New York and Manhattan Gas Light Companies in that respect" (Record, p. 5094); thus formally recognizing that the New York and Manhattan Companies did then have the right to use the streets.

THIRTEENTH.

The Metropolitan Franchise.

The finding of the Special Master, that the Metropolitan franchise was owned by the appellee and was perpetual (Record, pp. 195, 197), was confirmed by the Court (Record, p. 430).

The Metropolitan Gas Light Company was organized under a special charter granted in 1855 (Complts. Ex. 10, Record, p. 4852).

L. 1855, Ch. 545.

Its corporate existence was unlimited ; and the Company was expressly authorized (Sec. 1) to exercise, "at any time hereafter",

that is, in perpetuity, the powers conferred upon it. The language of the first section, by which the authority was granted, is obviously modeled after the similar section in the Manhattan charter of 1830, although there are various provisions more favorable to the Company, evidently inserted for the purpose of preventing any possible doubt as to the construction of the Act.

"Full power and authority" are conferred to engage in the business of manufacturing and supplying gas and to lay mains. After the provision that no street should be dug into without the permission of the local authorities, this further provision is added, which is not contained in the charters of the older Companies:

> "And the said Boards are hereby authorized to grant and vest *exclusive* permission and authority to and in said Company for said purposes, to such extent and under such regulations as to them shall seem expedient, and such permission and authority shall be conclusive and shall continue as thus fixed during the period designated by said boards at the time of granting the same. But the rights and privileges hereby granted shall not be construed to affect or impair any exclusive rights or privileges vested in any incorporated company in said City."

Section 11 of the Act (Record, p. 4855) contains a provision similar to those in the New York and the Manhattan Charters, that the Act shall "be favorably construed for the purposes herein expressed, and declared in all courts and places whatsoever."

I. There having been a direct legislative grant to the Metropolitan Company, which was expressly made perpetual, and no power having been given to the local authorities to limit the duration of the grant or to impose conditions upon its exercise, any attempted limitation of it would have been a nullity, under the decisions heretofore cited (*ante*, pp. 92, 103 *et seq.*).

II. The only power granted to the municipality, aside from giving it the right to prescribe the usual regulations in connection with the opening of the streets, was to confer "*exclusive*" authority upon the Company, for such period and upon such conditions as

might be prescribed. The Legislature thus gave the municipality power to *enlarge* the rights of the Company, by granting an *exclusive* franchise to territory not previously occupied; but it gave no power to limit the franchise. Doubtless, the incorporators of this Company hoped to induce the local authorities to grant them an *exclusive* franchise for some portion of the City, for some definite period of time, and had been advised that the City had no power to do this unless the Legislature expressly granted the power. The City did not attempt to exercise the power to confer "exclusive" authority upon the Metropolitan Company; and its attempt to limit the *general* rights of the Company was a nullity.

> Des Moines Street Ry. Co. v. Des Moines, 154 Fed. Rep., 854, 862.

In that case, the Railroad Company had been given an *exclusive* right to occupy the streets of the defendant for thirty years. At the expiration of that period, the City undertook to compel the Company to remove its tracks. Held, that the franchise was not limited to thirty years, but was perpetual, and that the thirty year limitation applied only to the exclusive or monopolistic feature of the franchise.

III. The power conferred by the legislature upon the City to grant an *exclusive* right to the Metropolitan Company did not in any way detract from the general authority directly conferred on the Company by the legislature.

> Abbott v. Duluth, 104 Fed. Rep., 833.

In that case, Judge LOCHREN said (p. 837):

> "These rights and powers, being unlimited in respect to duration, were valuable property rights, not merged nor excluded by the special acts referred to, which granted in addition the *exclusive* monopoly of occupying the streets, etc. of Duluth, and later of West Duluth, with telephone poles and wires for a limited time. This monopoly, which was the only real grant made by the special acts, ceased with the lapse of the prescribed time; but the unlimited right to oc-

cupy the highways of the city remains and continues. The acceptance by the company of the special *exclusive* rights granted by the special acts for a fixed time, and presumably of value, cannot be construed as a refusal, disclaimer, or surrender of the rights and powers granted to and vested in the company by the general law. There was no inconsistency. The company could receive and enjoy all the rights and powers given by the general law and the special acts. No election or disclaimer was required or expected. Both the general law and the special acts were beneficial, and will, therefore, be presumed to have been equally acted on and relied upon".

IV. It is thus evident that the appellee has a perpetual right to use the streets under the Metropolitan charter.

FOURTEENTH.

Summary as to the special franchises now owned by the appellee.

The Consolidated Gas Company now has the following rights, under the franchises of its constituent Companies:

I. A perpetual right, under the New York franchise, for the Boroughs of Manhattan and the Bronx.

II. A perpetual right, under the Manhattan franchise, for the Boroughs of Manhattan and the Bronx.

III. A perpetual right, under the Metropolitan franchise, for the Boroughs of Manhattan and the Bronx.

IV. A right under the Anthracite franchise (acquired by the Knickerbocker Company), for the Boroughs of Manhattan and the Bronx, until 1913.

V. A perpetual right, under the State Grant (acquired by the Knickerbocker Company), for that portion of the City north of 79th Street.

VI. A perpetual right, under the Harlem franchise, for that portion of the City north of 79th Street.

PART IV.

VALUE OF FRANCHISES AND GOOD WILL.

The Special Master allowed $20,000,000 for the combined value of the franchises and good will, not attempting to apportion the value between the two (Record, p. 210). The trial Court rejected the item of good will, and found that the value of the special franchises of two of the constituent companies was *at least* $12,000,000 (Record, p. 431). The finding of the Master was an ultimate fact, resulting from the consideration of many complicated and difficult questions of fact; and it should not have been disturbed by the Court, unless it was improper to include in the assets anything for the so-called good will. That it was not improper to include this item has heretofore been shown (*ante*, p. 69).

It is immaterial that the Master did not separately find the values of the special franchises and good will, if the evidence shows that the value of the one added to that of the other is equal to or exceeds the sum of $20,000,000. He valued the intangible property as an entirety. In valuing the intangible property of the Company, it is manifestly very difficult to draw the precise line between the value of the special franchises and the value of the good will.

FIRST.

The value of the special franchises.

On the evidence in this case, the special franchises alone are reasonably worth much more than was found either by the Special Master or by the Court.

I. The universal practice to assess property for purposes of taxation at less than its actual value is a matter of general knowledge, which has been recognized and rebuked by the courts.

People *ex rel.* Equitable Gas Co. v. Barker, 144 N. Y., 94, 99–100;
People *ex rel.* Manhattan Ry. Co. v. Barker, 146 N. Y., 304, 313;
Railroad Companies v. Board of Equalizers, 85 Fed. Rep., 302, 308;
Cummings v. Bank, 101 U. S., 153;
New York State v. Barker, 179 U. S., 279, 286.

II. For the year 1906, the special franchises of the Company were assessed at about $24,000,000, exclusive of the mains and connections (Record, pp. 202, 1849, 5061). The Tax Law requires the State Board to fix the value of these franchises (Sec. 42) and to hear all complaints in regard to values so fixed (Sec. 43), before making them final. In the absence of any evidence to the contrary, that valuation should be accepted by this Court as conclusive.

Railroad Companies v. Board of Equalizers, 85 Fed. Rep., 302;
Adams Express Co. v. Ohio, 166 U. S., 185.

1. In Railroad Companies v. Board of Equalizers, the Court said (p. 315):

> "Where true value is a constitutional requirement, as in Tennessee, it would seem to follow logically that such value, for the purposes of taxation, must be substantially the same thing as when value is inquired about for the purposes of regulation."

While true or full value is not a constitutional requirement in New York, it is a statutory requirement, which has been enforced by the courts.

Tax Law, Sec. 21, subd. 3, Sec. 37;
People *ex rel.* Manhattan Ry. Co. v. Barker, 146 N. Y., 304, 312–313.

2. In Adams Express Co. v. Ohio, Mr. Justice BREWER, in delivering the unanimous opinion of the Court, said (p. 220):

> "Now it is a cardinal rule, which should never be forgotten, that whatever property is worth for the purposes of income and sale, it is also worth for purposes of taxation."

That equation must necessarily remain true, if it is stated conversely.

III. Owing to the peculiar character of the property right in such franchises, the difficulty of valuing them is very great. So great did it seem to the Court of Appeals, when it passed upon the validity of the Act providing for the assessment of such franchises for purposes of taxation, that it gave this as the sole reason for holding that the home rule provision of the Constitution had not been violated, in conferring the power to assess local franchises upon a State Board; and it expressly held that only such a Board of highly trained and experienced men was competent to fix a value upon this class of property.

People *ex rel.* Met. St. R. Co. v. Tax Commrs., 174 N. Y., 417, 438.

On this point, the Court said (p. 439):

> "This property was *sui generis*, and from its nature could not be valued by local officers. Unless it escaped taxation in the future as it had in the past, it was necessary to commit the power to other officers, with new functions, wider experience and greater opportunities for observation * * *. They (the franchises) were specialties and had no market value. * * * The value depends upon so many conditions, existing frequently in localities widely separated, and upon such a complication of facts and figures, that the valuation cannot be safely entrusted to men of common knowledge and experience."

IV. In the present case, the appellee did not rely upon the assessed value of its franchises, but called the very best possible expert on the subject, the Chairman of the State Board of Tax

Commissioners, who had taken part in the assessment of 1906; and it proved affirmatively by him that $24,000,000 was the reasonable value of the intangible part of the franchises of the Company (Record, pp. 202, 1849, 5061).

The appellants *did not call a single witness to testify on the point;* and the only manner in which they attempted to break the force of this positive and uncontradicted testimony was by asserting that it did not appear that the witness knew what the franchises of the Company were, when he made his estimate. But that was for them to expose, on cross-examination, if they believed that the witness had no information concerning the Company's franchises at the time when he acted in an official capacity in assessing their value. A single question would have elicited the information.

The Court will certainly not assume that a State officer, of such exceptional experience, occupying a position of such great importance and responsibility, would attempt to make an assessment of millions of dollars upon property about which he knew nothing. It will presume that the officer performed his full duty and completely acquainted himself with all the facts.

Seaboard Air Line v. Florida, 203 U. S., 261, 270.

That the State Board was fully possessed of all the facts concerning the franchises is clearly evident from the provisions of the Tax Law (Sec. 43), which require every corporation, under very severe penalties, to report under oath to the Board every special franchise possessed or enjoyed by it; and the Board has power to require supplemental reports, from time to time.

The very best evidence which, in the opinion of the Court of Appeals, could possibly be adduced was thus given affirmatively by the complainant; and no attempt was made to contradict it or to discredit the witness, who was entirely disinterested, except in so far as his official position would naturally lead him to sympathize with the defendants. Neither the Special Master nor the trial Court was at liberty to disregard that evidence; and the finding should have been in accordance with it, for the sum of $24,000,000.

V. The value of at least $12,000,000, found by the Court for two of the franchises, was arrived at by a process of reasoning based upon the valuation of the franchises at the time of the consolidation in 1884, at $7,781,000, and the natural increase in the value since that time.

If the franchises were worth $7,781,000, in 1884, it is evident that they are worth vastly more than that to-day. Under these franchises, the Company has a perpetual right to use the streets of the City. During the past twenty-three years, the City has more than doubled in population, while the relative increase in the amount of gas consumed has been even greater than the increase in population, the consumption in 1905 being more than 13,000,000,000 cubic feet, as against less than 4,000,000,000 cubic feet in 1885 (Record, p. 5039).

Furthermore, the physical space available for gas mains has practically all been disposed of on Manhattan Island; and that condition has largely come about since 1884, first, by the introduction of lighting by electricity, involving the use of underground conductors, second, by the statute of 1884 (L. 1884, Ch. 534), which required all telegraph and telephone companies to remove their wires from the surface of the streets before November, 1885, and, third, by the construction of subway railroads.

Even had these exceptional and peculiar conditions not existed in New York, the continuous growth of the city and the occupation of all the available space in the streets would have rendered an existing occupation of the streets of constantly increasing value. This was recognized by the Court of Appeals, in the recent case of Western Union Telegraph Co. v. Syracuse Electric Light Co. (178 N. Y., 325), where the Court said (p. 330):

> "Space beneath the surface of the streets in our large cities is becoming more valuable every year for the purpose of conducting water, heat and light to the dwellings of the inhabitants as well as for the construction of sewers, underground railroads, subway lines, pneumatic tubes and other agencies of great public utility";

and in Ghee v. Northern Union Gas Company (158 N. Y., 510), the Court said, with respect to the streets of New York City (p. 514):

> "The use of the space in the streets of New York, whether on the surface or beneath it, has been steadily growing in importance and value and will probably so continue for many years to come."

The fact was also referred to by this Court in New Orleans Gas Co. v. Drainage Commission (197 U. S., 453), where the Court said (p. 461):

> "The need of occupation of the soil beneath the streets in cities is constantly increasing, for the supply of water and light and the construction of systems of sewerage and drainage."

In 1884, the population of New York City, north of 79th Street was confined almost entirely to a few straggling villages. To-day, that population is probably nearly as great as was that of the entire City south of 79th Street, in 1884; and the values south of 79th Street have also increased enormously.

VI. The method pursued by the Court is criticised by the appellants, on the ground that the valuation of 1884 included patents, contracts and good will, in addition to the special franchises. That fact, however, was taken into consideration by the Court (Record, p. 419). The valuation of $7,781,000 was reached, in a general way, at the time of the consolidation of the Companies, by taking the approximate difference between the market value of their stock and the appraised value of the tangible property, after setting aside $1,303,000 for working capital (Record, p. 5384). The Court will take judicial notice of the fact that the year 1884 was a period of financial panic and widespread depression throughout the country, when all quotations were affected by the disturbed conditions. No stocks were quoted at as high figures as they would have been quoted had not such conditions then existed.

In discussing this subject, the appellants also entirely ignore the fact that the constituent companies paid off a considerable portion of their floating indebtedness prior to the consolidation and that a permanent indebtedness of $2,232,000 was transferred to the new Company (Record, pp. 573, 4496, 5731). This, of course, represented value or capital assets in addition to the market value of the stock.

The appellants assert that there was included in the valuation at that time a sum of from $2,000,000 to $3,000,000 for the patents of the Companies. The only foundation for such an assertion was the statement of the Vice-President of the Company as to what the patents of the Consolidated Company were worth *in December, 1885* (Record, p. 6465), more than a year after the consolidation had taken place; and there is no evidence that the Company had not acquired those patents subsequent to the consolidation. Neither is there any evidence tending to show that any patents owned by the constituent companies in 1884 were taken at more than a nominal valuation in the consolidation.

As the Court below observed (Record, p. 417), there was no attempt to place an accurate and precise valuation upon the franchises, in 1884.

The franchises of all corporations have been treated, until recently, very much in the manner that a healthy person regards the vital functions of his body; he is scarcely conscious of their existence and virtually ignores them until something goes wrong and he is aroused to a sense of their importance. It is only recently that attention has been directed to the special franchises exercised by public service corporations; and, in 1884, there was no attempt to appraise the value of the franchises of the constituent companies with mathematical exactness nor to apportion that valuation among the Companies, except, approximately, on the basis of their earnings. Undoubtedly, as the Senate Committee reported, the franchises alone (excluding all other intangible property) *of only four of the Companies* were worth *much more* than $7,781,000 (Complainant's Ex. 227, Record, p. 5386).

As to the contracts referred to by the Vice-President of the Company, in December, 1885, the evidence shows that these were contracts between the constituent Companies (Record, p. 6269), which obviously could not have been considered in the consolidation.

VII. Independently of all testimony in the case, the Court cannot but conclude that the right to lay and maintain gas mains in the streets of New York (that is, in the present case, in the Boroughs of Manhattan and the Bronx) is one of enormous value; and that is expressly conceded by counsel for the Public Service Commission (Brief, p. 221). As to what value shall be ascribed to it, probably no two persons would be found to agree exactly.

In the Court below, the appellants contended that the difficulty of accurately estimating the value of the franchises was so great that no attempt to value them should be made, because any valuation would be a mere "guess". A guess is a conjecture, indulged in without sufficient facts upon which to base a rational judgment. When there are facts and considerations upon which a judgment can be based, the conclusion reached is no longer a mere guess; and the fact that there may be difficulties in the way of reaching an exact conclusion and that two persons of equal intelligence may differ in their conclusions, does not, in the eye of the law, impair the value of the result. That is so, in varying degrees, in all matters affecting human conduct; and, it is peculiarly so where a tribunal is required to estimate the uncertain damages resulting from a tort, or from a breach of an executory contract, where the damages are largely conjectural.

If the difficulty of valuing special franchises were insuperable, they could never be taxed; and the Special Franchise Tax Law, which was held by this Court and the Court of Appeals to be valid (199 U. S., 1), would have been a nullity. The fact that special franchises are now universally taxed shows that there is no serious difficulty in valuing them. In New York City, under its present Charter, (Section 74), before a special franchise can be granted, the Board of Estimate and Apportionment must pass upon the adequacy

of the price to be paid for it. These franchises are, therefore, now disposed of in such manner as to give them a recognized market value. There is thus a substantial basis for estimating their value, which does not exist in the innumerable cases which are constantly being disposed of, where it is necessary for a court or jury to determine the very uncertain and problematical damages resulting from the loss of life or limb.

VIII. The fact that the Company, in *certiorari* proceedings instituted by it, has contested the right of the State to tax its special franchises and, in some of its returns to the State Board, has given the value only of its tangible property, is of no consequence in a case of this kind. Acting under the advice of counsel (Record, p. 1246), the Company made such statements for the purpose of taxation as would raise the issues of fact and law and protect its legal rights in having the assessment reviewed.

The petition and return, in *certiorari* proceedings, are the formal pleadings, corresponding to the complaint and answer in an action.

People v. Stilwell, 190 N. Y., 284.

In other words, the petition merely sets forth the legal position asserted by the petitioner; and it was a statement of this kind, made by Mr. Carter (Record, pp. 1239–1247), which the appellants criticise, but which the Special Master found was not improper (Record, p. 216).

The record shows that in spite of the protests made by the Company against an increase in the assessed value of its franchises, the assessments have been increased from $13,950,000, in 1900, to $31,900,000 in 1906.

If the figures given by the Company in its returns had been adopted by the State Board, there might be some ground for claiming that the Company was bound by them. But they were not adopted. On the contrary, they were entirely disregarded; and the value of the special franchises of the Company has been increased from year to year, by the State Board, ever since the

Special Franchise Act took effect (Record, pp. 1667, 3101, 6702, 6710).

Even, however, if the State Board had specifically adopted the Company's figures, that would not have created an estoppel against it. It would merely be evidence, to be taken into consideration with all the other facts, in ascertaining the "actual value of cost or reproduction".

Southern Pacific R. Co. v. Board of Railroad Commissioners, 87 Fed. Rep., 21, 22;
Louisville R. Co. v. Brown, 123 Fed. Rep., 946, 949;
San Diego Land Co. v. Jasper, 189 U. S., 439, 443.

IX. The Court below did not specifically pass upon the value of the New York, Manhattan and Metropolitan franchises, because it did not consider it necessary to do so (Record, p. 432), as it found that the value of the other franchises owned by the Company was "*not less than*" the sum of $12,000,000 (Record, p. 418). But each one of those franchises is perpetual and coextensive with the entire City, as has been heretofore shown; and each one is undoubtedly worth a very large sum, in addition to the amount expressly found by the Court.

SECOND.

The value of the good will.

While it may be difficult to estimate the value of the good will with mathematical precision, the substantial basis of value is much more solid in the case of the business of the appellee than it is in the case of an ordinary mercantile business.

I. There is no doubt that the combined property of the Company has a value which is largely in excess of the separate values of the properties of its constituent companies.

In Cleveland Ry. Co. v. Backus (154 U. S., 439, 444), the Court referred to the New York Central Railroad as an illustration of the additional value given to a combined property over that of the properties of the separate companies. A railroad constitutes just as complete a monopoly as a gas business.

II. The estimate of Dr. Humphreys (a most eminent authority upon the subject) of $7,500,000 for the good will (Record, p. 1689) was extremely conservative. Mr. Addicks, on a more definite mathematical basis, estimated the value, on a 7% return, at $18,975,000 (Record, pp. 209, 1766).

Even without these estimates, there cannot be the slightest doubt that a very substantial sum should have been allowed for the value resulting from a long established and extensive business of this kind, in successful operation in the metropolis of the country; and the finding of the Special Master was abundantly supported by the evidence.

PART V.

THE SPECIAL FRANCHISES AND GOOD WILL SHOULD BE INCLUDED AMONG THE ASSETS UPON WHICH THE APPELLEE IS ENTITLED TO A RETURN, AND A VALUATION AT LEAST EQUAL TO THAT PLACED UPON THEM BY THE SPECIAL MASTER SHOULD BE ADOPTED BY THIS COURT.

Washington, October, 1908.

SHEARMAN & STERLING,
Solicitors for Appellee.

JOHN A. GARVER,
Of Counsel.

FILED.
NOV 4 1908
JAMES H. McKENNEY,
Clerk.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1908.

No. 398.

WILLIAM S. JACKSON, AS ATTORNEY-GENERAL OF THE STATE OF NEW YORK,

Appellant,

against

CONSOLIDATED GAS COMPANY OF NEW YORK,

Appellee.

BRIEF.

W. BOURKE COCKRAN,
Amicus Curiæ,
31 Nassau Street,
New York.

THE EVENING POST JOB PRINTING OFFICE, 156 FULTON ST., N. Y.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1908.

WILLIAM S. JACKSON, as Attorney-General of the State of New York, *et al.*, Appellants, AGAINST THE CONSOLIDATED GAS COMPANY OF NEW YORK, Appellee.	Number 398.

The undersigned, representing an ownership of Twelve hundred and ninety shares of the capital stock of the Brooklyn Union Gas Company, and Twenty-six thousand dollars of its bonds, convertible on March 1st, into stock at par, making a total interest of Fifteen hundred and fifty shares, respectfully asks leave to file this brief *amicus curiæ*.

The Brooklyn Union Gas Company is situated in the City of New York, and is subject to the same legislation of which the appellee complains. It has instituted a suit identical in character with this action which has not been pressed to trial, but of which the result here will undoubtedly be decisive.

It is apprehended that if the decision of

the Circuit Court in this action should be affirmed, any regulation of corporations exercising public franchises in the City of New York would be made so difficult as to be practically impossible, and the community or municipality in the face of such a condition will very probably feel impelled to take the manufacture and distribution of gas into its own hands,—building its own plant and furnishing the commodity by its own agents,—a course which must work great injury to stockholders of the different companies by imperilling, if not wholly destroying the value of their investment. Leave of this Court is craved, therefore, to submit certain reasons which appear to have been overlooked below for holding Chapter 125 of the Laws of 1906 to be well within the constitutional authority of the New York Legislature.

Most of the elements entering into this cause —nearly all of them—the value of the plant and real estate, the cost of producing gas, the earnings gross and net, the right to consider its franchises as property used in its business and on which, therefore, the company is entitled to some return—have been argued elaborately by counsel on both sides and considered exhaustively by the Court at Circuit. No attempt will be made here to amplify the discussion in these respects.

Three features of this question, however, it is ventured to suggest, should be made clearer than the Court below has left them:

First: The exact meaning, significance and extent of the security guaranteed by the Constitution to property of corporations employed in operating public franchises.

Second: The right of the Legislature to ascertain for itself facts necessary to the exercise of powers

undoubtedly belonging to it, and the extent to which a Court may substitute its own judgment on questions of fact for the judgment of the Legislature reached not capriciously or recklessly or corruptly, but after exhaustive inquiry, full hearing and elaborate discussion on matters admittedly affecting legislation and

Third: The authority of the Courts to set aside completely a law reducing rates to be charged by a public service corporation, and to restore the original rates exacted from the community where three-fourths of the reduction are conceded to be within the competence of the Legislature,—if not incumbent on it as public duty,—and its authority was exceeded—if at all—only as to one-fourth.

FIRST POINT.

It was error in the Court at Circuit to hold that no rate can be constitutionally enforced on this public service corporation which does not allow the company to earn six per cent. upon the property employed in its operation.

Ever since attempts were first made to regulate by legislation rates charged by public service corporations, this Court has always held unvaryingly to two principles: (1) Power to regulate the charges and operations of such corporations is an incident to sovereignty which the State has power to exercise through its political department, Munn *v.* Illinois, 94 U. S., 113, but (2) *"this power to regulate is not a power to destroy, and limitation is not the equivalent of confiscation. Under pretence of regulating fares and freights, the State cannot require a railroad corporation to carry persons or property without reward; neither can it do that which in law amounts to a taking of private property for public use without just compensation, or without due process of law."*

Stone v. *Farmers Loan & Trust Co., 116 U. S., 307-331.*

Thus while admitting the power of the Legislature to regulate charges of a railroad company, the right of the corporation to a judicial hearing as to whether the rates so fixed were so low as to be confiscatory was held to be a constitutional privilege of which it could not be deprived.

Chic., M. & St. P. R. Co. v. *State of Minn., 134 U. S., 418.*

The duty of the Courts to interfere in certain cases to prevent confiscation of property employed in operating public franchises under pretence of regulation having been established, it has become necessary to determine with some degree of preciseness the circumstances and conditions under which that power should be exercised. While it is thoroughly well settled that a rate which is confiscatory cannot be enforced, it is by no means settled which department of government is authorized in every case to decide whether a rate is fair and reasonable, or by what standard its fairness and reasonableness is to be measured.

On this head Mr. Justice Harlan, writing the opinion of a unanimous Court, says:

> "It should also be remembered that the judiciary ought not to interfere with the collection of rates established under legislative sanction unless they are so plainly and palpably unreasonable as to make their enforcement equivalent to the taking of property for public use without such compensation, as under all the circumstances is just both to the owner and to the public; that is, judicial interference should never occur unless the case presents, clearly and beyond all doubt, such a flagrant attack upon the rights of property under the guise of regulations as to compel the Court to say that the rates prescribed will necessarily have the effect to deny just compensation for private property taken for the public use."
>
> San Diego L. & T. Co. *v.* National City, 174 U. S., 739, at p. 754, and cases there cited.

And at page 756, the Court further said:

> "This Court had previously held in Covington & Lexington T. R. Co. *v.* Sandford, 164, U. S. 578, 597, 598 (41: 560, 566, 567), —which case involved the reasonableness of

> rates established by legislative enactment for a Turnpike Company,—that a corporation performing public services was *not entitled, as of right* and without reference to the interests of the public, *to realize a given per cent. upon its capital stock;* that stockholders were not the only persons whose rights or interests were to be considered; and *that the rights of the public were not to be ignored.* * * * The utmost that any corporation operating a public highway can rightfully demand at the hands of the Legislature, when exerting its general powers, is that it receives what under all the circumstances is such compensation for the use of its property as will be just both to it and to the public."

It is respectfully submitted that the logical deduction from these decisions and all others rendered by this tribunal is that the courts are concerned *solely in maintaining the security of property, not with guaranteeing a profitable use of it.*

This distinction between the *security of property and the profitable employment* of property seems to have been overlooked by the Court at Circuit, which appears to have considered itself bound not simply to protect the property of the stockholders of the appellee from positive loss or injury, but to secure some degree of "attractiveness" for their investment (see the Original Opinion, fols. 134-135, and Supplemental Opinion, fol. 41).

An expression of Mr. Justice Harlan in Covington & Lexington Turnpike Co. *et al. v.* Sandford *et al.* 164 U. S., 588, to the effect that in considering the fairness and reasonableness of a rate *"each case must depend upon its special facts,"* seems to have been construed by the Court at Circuit as authority for declaring that cases of this character are not to be governed by any fixed rules.

The exact language of the Circuit Judge on this

head is: "*I believe the decisions end to-day about "where they began,—declaring only that 'each case "must depend upon its special facts,' Covington "&c. Turnpike Co. vs. Sandford, supra,* (Opinion of judge at Circuit, fol. 128)."

It is submitted that nothing could be more erroneous than such an interpretation of Mr. Justice Harlan's language. This court has not labored to so little purpose in the long line of decisions rendered by it on this and kindred subjects.

The proposition, as Mr. Justice Harlan states it, is perfectly clear and absolutely unanswerable. Indeed it is self evident. Every case involving rates turns upon some distinct and peculiar state of facts. To say that these facts must form the basis on which its disposition depends is far from affirming or intimating that in dealing with them no fixed rule is to be observed, and that where a rate fixed by the Legislature is challenged, its reasonableness must in every instance be determined by the Court as an entirely independent original proposition, without regard to precedents established by other cases or in other proceedings.

Throughout opinions rendered by this Court in many different cases, especially those contributed by Mr. Justice Harlan and Mr. Justice Brewer, the assertion frequently recurs that "*this is a government of laws not of men*," a principle vital to the constitutional system of which this great tribunal has always been the faithful depositary and its members vigilant guardians. But surely if the mere discretion of a man, even though he be a judge, not governed or controlled by any fixed rule, but free to dispose of each case "upon its special facts," as they appear to him, is the final authority to decide a question so momentous, fraught with such consequences to the community and the corporations chartered to serve

it, then in this respect at least our government emphatically *is* a government of men, *not* of laws.

The opinion expressed by the learned judge at Circuit that it is impossible to fix by a definite rule the respective limits of legislative and judicial authority on this subject, it is respectfully submitted, is an erroneous conception of our constitutional system. The proper field of the Legislature on one hand, and of the Judiciary on the other, will not be impossible or even difficult to ascertain if we take the whole tide of decisions by this court and in the light of them examine carefully the relations which public service corporations bear to the community they are chartered to serve and the stockholders by whose capital they are operated. In the light of such an examination, opinions that appear to be contradictory will be reconciled, and doubts that appear most perplexing will be solved.

In Chic., M. & St. P. R. Co. *v.* State of Minn., 134 U. S., 418, quoted above—a leading case—Mr. Justice Blatchford, writing the opinion of the majority, says:

> "The question of the reasonableness of a rate of charge for transportation by a railroad company, involving as it does the element of reasonableness both as regards the company and as regards the public, *is eminently a question of judicial investigation, requiring due process of law for its determination.*"

Mr. Justice Bradley, writing the minority opinion (Mr. Justice Gray and Mr. Justice Lamar concurred with him) begins by saying:

> "I cannot agree to the decision of the Court in this case. It practically overrules Munn *v.* Illinois, 94 U. S., 113 [24:77], and the several railroad cases that were decided at the same time. *The governing principle of those cases was that the regulation and*

> *settlement of the fares of railroads and other public accommodations is a legislative prerogative and not a judicial one. This is a principle which I regard as of great importance."*

And farther on he says:

> "But it is said that all charges should be reasonable, and that none but reasonable charges can be exacted; *and it is urged that what is a reasonable charge is a judicial question. On the contrary, it is pre-eminently a legislative one,* involving considerations of policy as well as of remuneration; and is usually determined by the legislature by fixing a maximum of charges in the charter of the company, or afterwards, if its hands are not tied by contract."

Here appear to be two radically irreconcilable positions,—one it would seem wholly erroneous if the other be correct. And yet it is submitted both these eminent jurists were entirely correct, except that instead of the same question, as they supposed, they were really discussing two different questions or rather, they were discussing two different aspects of one question.

It is respectfully submitted that in one aspect what constitutes a fair and reasonable rate is a judicial question, to decide which the Courts alone are competent, while in another aspect it is a political question over which the Legislative Department has exclusive control—a control which it cannot abdicate or share with any body or other department of government.

The sense in which the question what constitutes a fair and reasonable rate is judicial, and the sense in which it is legislative will be made perfectly clear by recurring to a few elemental propositions which in these days are not questioned anywhere.

Under our industrial and political system there are two elements entering into a public service corporation: One the right to operate it—what is known as the franchise, the other the capital by which the franchise is placed in operation. The franchise—which includes the right to exercise the power of eminent domain—being an attribute to sovereignty, the right to control it must, always, remain with the sovereign, that is to say, with the state—the government. On the other hand, the capital by which the franchise is operated is the property of individuals who contribute it. It is private property dedicated to a public purpose.

The corporation in return for the special opportunities of profit which it enjoys, owes to the sovereign efficient service; and the sovereign—that is to say, the state or government—is bound to protect, from all manner of assault, or injury—under color of law or in open violation of it—the capital—the private property—dedicated to this public service. Stated in the narrowest compass, the corporation owes the people the most efficient service within the reach of human endeavor, consistent with security of the capital—not the fictitious amount at which it may be capitalized, but the real capital, the genuine property—actually embarked in it.

The right of all property—property engaged in operating public franchises no less than property otherwise employed—to security being absolute, it is the province of the courts to see that the security is complete, whether threatened by violence that is unauthorized, or by legislation that is unconstitutional.

But what is actually meant by this security of property? What does it involve? What are its essential features? What rights does it embrace?

While it is now settled beyond question that a rate which compels a public service company to do

business at a loss would impair the value of the capital embarked in it, and therefore, would be a taking of property without due process of law, which the Courts must condemn as confiscatory, it has not yet been held affirmatively by this Court that a rate which though it did not entail actual loss in operation, nevertheless was so low as to prevent the possibility of earning any profits would be beyond the *constitutional* power of the legislature to impose, and therefore the Courts would be bound to set it aside. Discussing the authority of the United States Courts to review the action of a Legislature in the regulation of rates, as established by the decisions of the United States Supreme Court, Mr. Justice Brewer distinguishes between corporations engaged in business of *"a public character,"* and those engaged in business *"not strictly of a public character,"* but in which *"the public have an interest,"* and says:

> "As to parties engaged in performing a public service, while the power to regulate has been sustained, negatively the Court has held that the Legislature may not prescribe rates, which, if enforced, would amount to a confiscation of property. *But it has not held affirmatively that the Legislature may enforce rates which stop only this side of confiscation, and leave the property in the hands and under the care of the owners without any remuneration for its use."*
>
> *Cotting* v. *Kansas City Stock Yards Co. et al., 183 U. S., 79, at p. 91.*

The time has arrived, it is respectfully submitted, when the necessities of commerce and of orderly government make it important if not vital that the courts should go a step further in defining constitutional security of property by holding it to include not merely safety of the principal—the right to hold its *corpus* intact—but in addition the right

of the owner to employ it so as to secure some return.

Unless property can be employed at a profit it won't be employed at all, and unless it can be employed it is not worth holding. A right of property, which did not embrace the right to employ it for the benefit of the owner, would be a mere right of custody, utterly valueless, a burden rather than a benefit, a penalty rather than a privilege, a hollow mockery, a trap for the unwary baited by delusive and misleading words.

Security of property, even in the narrowest and most literal sense, must include the right to earn some return. Property, whatever its form, cannot be preserved except at some expense. This expense, if not earned by employment of it at a profit, must be defrayed from principal, and the cost of maintenance being continuous would involve steady diminution of the property itself and finally its entire extinction.

Clearly then a rate, which even though it did not entail actual loss in operation—that is to say, an immediate, direct impairment of the property invested in corporations of this character,—yet was so low as to prohibit the possibility of earning any return on it—would be confiscatory, and the courts must intervene to forbid its enforcement.

If property embarked in public service corporations is entitled to any return, it must be an actual return—a return that is at least tangible.

What now is the return the courts are bound to see that no legislation will prevent a public service corporation from earning?

The Court below seems to have considered the legal rate of interest allowed in New York State to be, if not the measure, at least an indication of the profit which capital engaged in operating public franchises should always be permitted to earn in order to maintain its constitutional security. But

the legal rate of interest is the maximum profit that can be collected for the use of money in that State. The great majority of transactions on credit are at a much lower rate. The maximum rate of interest is profit, the minimum rate is security. And with security alone are the courts concerned.

The profit which the courts should fix as essential to the constitutional safety of property employed in operating public franchises, it is respectfully submitted, is simply that which will equal the min imum rate of interest paid for the use of money in the open market.

This rule is entirely consistent with all the decisions on this subject rendered by this august tribunal.

Mr. Justice Harlan has pointed out in Covington & Lexington Turnpike Road Co. *et al., v.* Sandford *et al., supra,* that a corporation performing public services is not entitled *"as of right and without reference to the interests of the public* to realize a given per cent. upon its capital stock."

And this observation is weighty, timely, unanswerable. Should, for instance, a public service corporation be shown to have been extravagant, corrupt or reckless, in disposing of its resources or employing its capital, the community should not be subjected to exactions in order that such profligate expenditures may be made to yield substantial returns. But for every dollar expended in good faith and with reasonable discretion in making its service effective, the courts will see that a company be allowed to impose such rates as will enable it to earn returns sufficient at least to maintain the security of its property.

Whether a rate is fair and reasonable in this sense—that is to say, *whether it violates or respects the security of property* embarked in the operation of public service corporations—is clearly

a question which the courts must determine, in the proper exercise of a most important function imposed upon them by the Constitution.

But there is another aspect of the question what is a fair and reasonable rate which is not judicial but legislative, which concerns not the constitutional security of property, but a great question of public policy, with which the political side of the government alone is competent to deal.

In this country it always has been a policy of government to enlist private enterprise in the operation of public franchises. Now, the only way by which private individuals can be induced to invest capital in this form of public service is by offering them opportunity to earn adequate profits.

How much that profit should be—what constitutes the fair and reasonable rate that will allow such a profit to be earned—and thus encourage the investment of capital in making public franchises effective—is a question of policy to be decided by the political or legislative department, with which the Courts could not deal effectively, even if the legislative sought to bestow the power upon them.

Not only is this the boundary between judicial and legislative functions fixed by our Constitution, but it is the natural boundary between them, as will be apparent if we conceive for a moment the essential functions of a Court.

The function of a Court is to declare and establish the law, constitutional or statute. The law to be law must be fixed, certain, and definite. The Courts, therefore, can have no power to relax, change or modify it.

The Legislature, on the other hand, is created expressly to prescribe new enactments or relax existing statutory provisions, as it may think will serve the public weal.

The function of the Courts is to ascertain what the law is and then declare it; the function of the Legislature is to ascertain what the law ought to be and then enact it.

A Court can never consider policy in the sense of squaring its decision by it. But policy is a thing the Legislature is bound always to consider. The Court must declare the law, whatever consequences the judges may apprehend from their decision. In this respect no discretion is open to them. The discretion sometimes given to judges in dealing with individuals—especially in imposing penalties on offenders against the State—they can never exercise when interpreting the law under which they act. They must always and everywhere declare the law, not perhaps as they would have framed it or as they might like to make it, but as they find it—as it is—as the framers made it.

The Legislature, on the other hand, being required to deal with all matters of policy is preeminently a field for the exercise of discretion. Instead of ignoring considerations of policy, it should be governed by them.

While, therefore, it remains a policy of the country to invite the employment of private property in the operation of public franchises, the Legislature must fix the condition by which owners of capital may be induced to engage in this form of service. The profits which should be allowed investors with this object might be six per cent. at one time, at another ten per cent., or twelve per cent., according to the varying rates of interest for money and the requirements of public convenience. Fixing these rates is distinctly a matter of public policy, and therefore it is a function essentially and exclusively legislative. The Courts could not discharge it effectively even if they tried, and if all other departments of government were willing they should assume it.

The duty of this Court, it is respectfully submitted, is to recognize these separate spheres, and by clearly defining them, establish in the judiciary complete power to decide what is the reasonable rate necessary to maintain the *constitutional security of property,* while acknowledging in the Legislature equally unquestioned power to fix the fair and reasonable rate necessary to encourage the investment of capital in such enterprises.

The rate at which the law of 1906 requires the appellee in the case at bar to sell its product ensures it a net return of over five per cent. on its property, including as property the franchises it holds from the State, and this being ample to maintain its property in security every constitutional requirement necessary to the validity of such legislation has been met and the decision of the Court at Circuit adjudging the statute unconstitutional and void should be reversed.

SECOND POINT.

The Legislature, having inquired into the cost of gas and having concluded after full investigation where every interest was heard, that a rate of eighty cents per thousand feet is adequate to allow the companies, engaged in furnishing this commodity, a fair and reasonable profit on the capital actually employed in the business, its conclusions in that respect should be controlling. At least, they should be held controlling in the absence of any assertion, pretense or shadow of proof that the course of the Legislature had been governed by recklessness or any unworthy or improper motive.

It is respectfully submitted that, unless a conclusion of the Legislature on a question of fact reached after full inquiry properly authorized and honestly conducted, concerning a matter admittedly within the scope of its authority, be binding on all other departments of government, including the judiciary, the legislative department is not an independent or co-ordinate branch of the Government, but a subordinate and inferior body.

All proceedings of a public body clearly within its competence are entitled to credit by every other public body. This is the very essence of a separate or independent jurisdiction.

In the case at bar, the Legislature having investigated the manufacture and supply of gas in

New York City for the avowed purpose of ascertaining the rate which would allow companies engaged in this business a fair return on their property, while prohibiting them from imposing extortionate rates on the community, passed a law fixing eighty cents per thousand feet as the maximum price that might be charged for this commodity, whereupon a judge of the United States, sitting at Circuit, undertook an entirely independent inquiry into the same subject, and having reached a conclusion on this question of fact slightly different from that of the legislative body, he proceeded to adjudge the law invalid and set it wholly aside.

If the position assumed in this respect by the Court at Circuit be sustained by this Court, it is difficult to see how the legislature can be considered a co-ordinate branch of government, or how it can be held to retain even a measure of independence.

Nothing in the prior judicial decisions of this country would justify such an emasculation of legislative independence and importance. On the contrary, the courts hitherto have always been careful to recognize that wherever the Legislature is given authority to deal with any subject it is the fullest authority, including authority to decide for itself all matters of fact incident to the exercise of its functions.

> "The Courts must, of necessity, presume (whatever may be averred to the contrary) that no general statute is ever passed either for want of information upon the part of the legislature or because it was misled by the false representation of lobbyists or interested parties."
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> Farmers' Loan & Trust Co. *v.* Chic. P. & S. Ry. Co., 39 Fed., 143.
>
> Angle *v.* Chicago, *Id.*, 912.

Where an act of the Legislature appropriating money to an individual for services rendered the State under appointment by the Governor is valid on its face, the Court will not look into evidence aliunde to determine whether it violates the Constitution, Art. 4, Sec. 25, Sub. 29, and Secs. 31 and 32, which provide respectively that the Legislature shall not pass any law affecting the fees or salary of any officer, make any gift of the public money, or award extra compensation to an officer after the service has been rendered.

Rankin *v.* **Colgan, 92 Cal., 605.**

Story, in his work on the Constitution, Vol. 2, Sec. 1342, says:

> "It would seem, as the power is given to Congress to suspend the writ of *habeas corpus* in cases of rebellion or invasion, that the right to judge whether exigency had arisen must exclusively belong to that body."

Surely, if the Legislative Department has *exclusive* power to decide for itself facts which authorize it to take action, affecting individual liberty so profoundly as a suspension of the *habeas corpus* act, it should not be denied practically all power to decide for itself facts which justify it in taking action affecting property to the moderate extent of fixing rates that a corporation exercising a public utility may exact from the community it serves.

This Court in all its decisions affecting legislative regulation of public service corporations has always recognized the right of a Legislature to ascertain for itself facts necessary to the effective discharge of this function.

> "But the Courts cannot, after the Board has fully and fairly investigated and acted, by fixing what it believes to be reasonable rates, step in and say its action shall be set

aside and nullified because the Courts, upon a similar investigation have come to a different conclusion as to the reasonableness of the rates fixed. There must be actual fraud in fixing the rates, or they must be so palpably and grossly unreasonable and unjust as to amount to the same thing."

Spring Valley Water Works *v.* S. F., 82 Cal., 286, cited with approval in San D. L. & T. Co. *v.* National City, 174 U. S., 739, at page 750.

"It should also be remembered that the Judiciary ought not to interfere with the collection of rates established under legislative sanction unless they are so plainly and palpably unreasonable as to make their enforcement equivalent to the taking of property for public use without such compensation as under all the circumstances is just both to the owner and to the public; that is, judicial interference should never occur unless the case presents, clearly and beyond all doubt, such a flagrant attack upon the rights of property under the guise of regulations as to compel the Court to say that the rates prescribed will necessarily have the effect to deny just compensation for private property taken for public use."

San Diego L. & T. Co. *v.* National City, 174 U. S., 739 at page 754, and cases there cited.

If the Legislature have any power to investigate conditions with a view to legislation clearly within its power, its conclusions of fact must be entitled to some weight. If they have any weight, they are entitled to full weight, at least in the absence of any proof that the Legislature has acted in bad faith. They are either entitled to full weight and authority or they have no force or significance whatever.

The right to inquire and ascertain facts is an indispensable prerequisite to wholesome legislation. If the Legislature be not competent to ascertain for itself a fact essential to its own procedure and if its conclusions on such a matter be not entitled to any consideration by other departments of government, it is idle to speak of it as a legislative body. It is not even a commission to propose legislation, much less a body competent to enact laws. This Court, it is confidently believed, will hesitate long before rendering a decision which must reduce the legislative branch to such insignificant proportions.

It is not open to question that the power to regulate public service corporations, if it exist anywhere, is in the Legislature. Before that power can be exercised effectively certain questions of fact must be decided. Before a reasonable rate can be fixed it is necessary to ascertain what is reasonable. This information can best be obtained by thorough and complete investigation of the whole subject. Such an inquiry concerning the cost of gas in New York City the New York Legislature undertook and prosecuted exhaustively (Record, p. 66, *et seq.*). It found that a rate of eighty cents would be sufficient to afford a reasonable return on the property employed in the manufacture and distribution of gas. That rate was fixed by a statute passed after all the testimony offered had been received and weighed; after prolonged and exhaustive arguments had been heard. (Record.) In the absence of any suggestion that hate, violence, fraud or other unworthy motive governed the Legislature its action, like the action of every official body, should be presumed to have been taken in strict obedience to the constitutional oaths of its members. Yet the Court at Circuit seems to have completely ignored this inquiry, and the proceedings based on it.

If the conclusion of a legislature based on careful inquiry be of no value—entirely negligible—then legislative investigations and examinations preliminary to legislation are a waste of time and funds, senseless and indefensible.

Failure to inquire before acting is the complaint most generally brought by thoughtful men against legislative bodies. Is this Court prepared now to declare such preliminary investigations wholly useless and indeed improper—by holding a conclusion reached after exhaustive inquiry, entirely negligible—so utterly useless that the expense of conducting it must have been an unjustifiable waste of public revenue.

If the valuation of real estate, plant and mains of the Company made by the Legislature be correct, a rate of eighty cents for its product would assure a return of more than six per cent. on its property. It would, therefore, have been, according to the opinion of the Court a fair and reasonable rate within the meaning of the Constitution. It was by fixing a different valuation of its own that the Court has reached the conclusion that an eighty-cent rate would yield a return of less than six per cent, though exceeding five per cent on the property of the corporation. By what principle of construction is the judgment of a Court on the value of real estate to be held so superior to the judgment of the Legislature on the same subject as to justify the complete nullification of a law solemenly enacted after deliberate consideration and careful investigation?

Conclusions as to the value of real estate are essentially speculative. In no sense can they be considered capable of demonstration. If a slight difference in estimating the value of real property between the Legislature and the Court be sufficient to render unconstitutional a law reducing rates

which admittedly were too high, then legislative power to regulate corporations can hardly be said to exist. It can be undertaken only under conditions that make it practically inoperative.

But if the community cannot regulate public franchises entrusted to private corporations—if its attempts at regulation be surrounded by such difficulties as to make them almost inevitably foredoomed to failure—there is still one remedy open to it—and that is to exercise these franchises itself by its own agents. It would be intolerable if corporations furnishing a commodity absolutely essential to the convenience and even the necessities of life be suffered to exist—to occupy public highways—to exercise the power of eminent domain—without being subject to governmental regulation of any kind.

Regulation of public service corporations being essential to the public welfare, it will be established, somehow or other. If it cannot be enforced against corporations to whom public franchises have been granted, then these franchises must be exercised by the community itself.

If this attempt at regulation fail, it is difficult to conceive how any can succeed. In that event, nothing can be clearer than that the community will very likely be driven to establish its own gas plant. On such a proposition, if submitted to him as a citizen, even a stockholder in a gas company whose sense of civic duty outweighs regard for his personal interests, would probably feel bound to vote in the affirmative.

The courts, it is believed, will be slow to sanction a doctrine which must result in placing citizens well-disposed and law-abiding in a position where the condition of performing loyally their full civic duty must be a sacrifice of their property interests.

THIRD POINT.

Even if the action of the Legislature in fixing a rate of eighty cents per thousand feet be unconstitutional, the Court erred in enjoining enforcement of the law to any extent whatever. The decree should have been limited to enjoining the State officers from enforcing any reduction below eighty-five cents per thousand feet, which rate the opinion of the Judge shows would have been ample to ensure full protection of the company's property according to the standard of constitutional security fixed by the Judge himself.

The opinion of the Court clearly shows that had the Legislature reduced the price of gas from a dollar to eighty-five cents, instead of eighty cents, a profit of over six per cent. would have been left to the company on all the capital actually employed in its operation—including its franchises as property—and this according to the standard fixed by the judge himself would have been sufficient to maintain the constitutional security of the property. Yet the judgment sets aside the law absolutely and wholly.

It is a familiar principle of construction that where certain features of a law transcend the constitution, yet others are within the power of the Legislature to enact, those features that are constitutional will be upheld. (Cooley on Constitutional Limitations, 7th Ed., p. 247.)

In the case at bar, even according to the valuation of real estate and other conclusions of fact

reached by the Court at Circuit, the Legislature had unquestioned power to order a reduction in the rate from one dollar to eighty-five cents. Its action, therefore, should have been held invalid only to the extent that it ordered a reduction below that rate.

The attention of the Judge evidently having been called to this before final settlement of the order, and a request apparently having been made that before any injunction be issued, and as a condition of its becoming effective, the company should be required to reduce the price of its product to eighty-five cents per thousand feet, as of the date on which the law was passed, that request was refused on three grounds.

FIRST.—Because such an order might lead all the parties herein to accept the decision of the Circuit Court, and thus prevent an appeal to this Court, it being considered important in the highest degree that the questions raised in this litigation be finally determined.

SECOND.—Because that question had not been raised in the pleadings.

THIRD.—Because such modification would in effect be fixing a rate by the Court and it would operate as coercion of the Company into conceding a rate of eighty-five cents to consumers, through fear that otherwise a rate of eighty cents might be imposed on it (Supplemental opinion, Fol. 47, Record, p. — *et seq.*).

Clearly, the first reason is no longer operative. The case is here in this court, which will undoubtedly pass upon it, and every feature of it.

The second ground, it is respectfully submitted, seems to be inconsistent with every principle of equity jurisprudence.

The testimony on which the Court was able to conclude that a rate of eighty-five cents would have been well within the constitutional power of the Legislature was admitted without question or objection. It is part of the record now. It is hardly conceivable that a motion to amend the pleadings so as to make them conform to the proof in this respect could have been denied. Indeed, it is passing strange that the Court, of its own motion, did not order such an amendment.

Moreover, this cause is not an issue affecting two private individuals, one of whom might fairly be made to bear any adverse consequence that flowed from his own neglect. The appellants have no personal interest in these proceedings. They are here purely as representatives of the community. That four millions and a half of people must continue to pay for a commodity essential to their comfort, at a rate more than fifteen per cent. higher than the Court itself holds reasonable, and that they should be left subject to these unreasonable exactions merely because of a defect in pleadings so purely technical and unimportant that it did not operate to prevent the admission of any testimony, is a proposition scarcely to be reconciled with any theory of equity announced, sanctioned, or accepted by this Tribunal.

It is the very essence of equity that its operations are always for justice.

It embodies in our system that ultimate prerogative of justice which in some form or other has been found necessary in every state of society to prevent the law itself from becoming perverted or distorted at times to the perpetration of injustice by rigid, unbending and unvarying enforcement of fixed rules.

This high prerogative in its nature is essentially discretionary, but discretion, as it is exercised by a court of equity, *"must not be arbitrary, fanciful or "capricious; it must be legal and regular; governed "by rules, not by humor."*

The distinctive characteristic of equity is that never under any circumstances can it be made to aid in the perpetration of injustice or to connive at it, whatever the consequences. If there be a wrong which cannot be redressed except at the cost of perpetrating another wrong, equity prefers to let the one it finds and for which it is not responsible continue rather than soil its own hands by stooping to an injustice, however slight, in an attempt to correct it. Yet here a law seeking to reduce rates which admittedly were too high, because the reduction slightly exceeds the limit considered reasonable by the Court, is nullified, not merely to the extent of the excess, but wholly and completely. The Court is not content to save the company from a rate which it considers too low by five cents, but it goes further and imposes on the community, for the benefit of the company, a rate too high admittedly by fifteen cents.

If it were absolutely necessary to inflict so severe an injury on the community in order to save the corporation from a much slighter injury, it might well be questioned whether a Court of Equity would under such circumstances feel itself justified in granting a permanent injunction. But this question does not arise here. To restore the dollar rate admittedly excessive, is not the necessary alternative to sustaining the eighty-cent rate which the Court holds inadequate. The Court, in its discretion, can forbid the enforcement of any rate below eighty-five cents—the rate found by itself to be just and reasonable—and thus do full justice to both the corporation and the community.

It is an elemental principle of equity that it will not take cognizance of a controversy, unless it can do complete justice to every one concerned in it or affected by it. Surely the community, the consumers of gas, are deeply affected by this controversy. And the Court of Equity which proclaims itself powerful enough to relieve a gas company from a rate that it considers slightly too low, should not be suffered by this great tribunal to confess itself powerless to grant such a measure of relief except at the cost of imposing on the community rates that are admittedly very much too high.

The suggestion of the learned judge at Circuit that to attach a condition to the issuance of this injunction order which would effect substantial justice between the community and the gas company by compelling the corporation to concede the rate which he himself held reasonable would in effect be fixing a rate by the Court—seems to be based on a misapprehension of his own decision. As matter of fact what the Court actually does by this very decree is to fix a rate. Whatever words, terms or formula may be employed to describe the result, nobody can question that a rate of one dollar per thousand feet for gas in the City of New York will be fixed in fact if this decision be upheld. And how will it be fixed? Not by legislative enactment—the Legislature has done everything in its power to lower the rate—but in spite of the Legislature, by order of the Court. The Court seems able to fix a rate that is unreasonable if not unconscionable, and to fix it so firmly that every consumer of gas in New York City must feel the burden of it, but a rate that by its own conclusion is reasonable and fair it professes itself unable to fix even as a condition of granting relief against a rate attacked as unfair. A conclusion so incomplete is not consistent with equity, as it has

been developed and amplified by the American Judiciary.

If eighty-five cents would have been a reasonable rate, according to the opinion of the Court itself, surely the community should not be sentenced to an exaction of fifteen cents beyond this reasonable rate, simply because of a mistake on the part of the legislative body in estimating the value of many different elements—constituting the property of the corporation.

LAST.

It is respectfully submitted that the judgment of the Court below should be reversed or at least modified, so that an injunction against the enforcement of Chap. 125 of the Laws of 1906, of the State of New York, will be issued only on condition that the plaintiff furnish its product at a rate not exceeding eighty-five cents per thousand feet.

W. BOURKE COCKRAN,
Amicus Curiae,
31 Nassau Street,
New York City.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 396.

WM. R. WILLCOX ET AL., CONSTITUTING THE PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK FOR THE FIRST DISTRICT, APPELLANTS,

vs.

CONSOLIDATED GAS COMPANY OF NEW YORK.

No. 397.

THE STATE OF NEW YORK, APPELLANT,

vs.

CONSOLIDATED GAS COMPANY OF NEW YORK.

No. 398.

WILLIAM S. JACKSON, AS ATTORNEY GENERAL OF THE STATE OF NEW YORK, APPELLANT,

vs.

CONSOLIDATED GAS COMPANY OF NEW YORK.

Brief Submitted by Nathan Matthews, as Amicus Curiæ, Tremont Building, Boston, Mass.

The undersigned, representing the complainant in the case of *Haverhill Gaslight Company vs. Barker*, depending since February, 1900, in the Circuit Court of the United

States for the District of Massachusetts (see —, Federal Reporter, page —), in which case are involved some of the issues before this court in the case at bar, respectfully asks leave of court to file as *amicus curiæ* the following brief or memorandum:

I.

The Franchise Question.

If the court is of the opinion that, under some circumstances, the value of a public service company's franchises should be disallowed as an item upon which the company is entitled, under the Fourteenth Amendment, to just compensation by way of income, the undersigned submits that a contrary result should be reached in cases where:

(*a*) the franchise has been paid for by the company in cash; or where

(*b*) the franchise has been granted for a definite period; or where

(*c*) the franchise specifically authorizes the company to charge a particular rate; or

(*d*) the franchise has been indirectly paid for under the compulsion of State laws, such for instance as those which obtain in some States prohibiting the issue of capital stock except at its market value. In such cases the subscribers to the new stock of a prosperous company are obliged to pay a premium representing the capitalized value of the earning capacity of the company, which is based, of course, in part on the company's franchises; and it would be grossly inequitable to permit the State to compel a purchaser of stock to pay a franchise value for it, and then to eliminate this value through a reduction of rates.

II.

On the Relation Between Share Capital and Investment in a Rate Case.

There can be no relation, useful for consideration in a rate case arising under the Fourteenth Amendment, between the complainant's investment and the par value of its share capital; for

(*a*) the share capital of the company may have been watered, and may thus be far in excess of the fair value of the company's assets; or

(*b*) the stock may have been issued at a premium, and may thus represent at par much less than the value of the company's assets; or

(*c*) the company may have obtained the money to build extensions and improvements from its surplus earnings rather than from the issue of stock, in which case the total outstanding amount of stock would be less than the value of the company's plant; or

(*d*) the stock may have no par value at all, for, as was frequently the case in the early part of the nineteenth century, the company may have been incorporated with so many shares of stock, but without a par value for the same (see as instances many aqueduct, canal, and other franchise companies incorporated in Massachusetts between 1783 and 1830); or

(*e*) there may be no company in the case at all. Public service franchises, such as are necessary to the exploitation of a water works, gas plant, electric light plant, etc., are frequently operated under legislative authority by individuals and firms, in which case there is no company and of course no stock.

III.

The Relation Between the Company's Assets and the Amount of Money Paid into the Plant from the Proceeds of Stock and Bonds.

There is no relation, useful for consideration in a rate case arising under the Fourteenth Amendment, between the physical assets of a public service company and the amount of money which has been raised by the sale of stock and bonds; for.

(*a*) the franchise may, as noted above, be operated by a private individual or firm without any corporation, stock, bonds, or dividends; or

(*b*) the company may have been financed largely from surplus earnings which might have been paid out in dividends, but which in fact have been turned into the plant, with the result that the outstanding stock and bonds have been kept down to a nominal amount.

In amplification of the point last noted, it is submitted that the surplus earnings of a public service company above the amount needed for operating expenses, depreciation, etc., belong to the stockholders, and may, at their election, either be paid out as dividends, or used for extensions, additions and other purposes for which fresh stock may be issued if the stockholders so desire.

There are two ways of managing a corporation. According to one method all surplus earnings as above defined are paid out as interest or dividends, and the cost of extensions, additions and improvements is met by the issue of fresh stock or bonds; the result being that the nominal or share capital of the company is increased from year to year and is generally approximately equal to the fair cash value of the company's physical plant. The other method, more com-

mon in the past than now, and more common in the case of strictly private corporations than in the case of public franchise companies, is to keep the capital as small as possible by devoting the surplus earnings so far as they go to defraying the cost of extensions, additions, and improvements; the result being that while the physical assets of the company increase from year to year exactly as under the other method, the capitalization of the company is kept at a nominal or fairly constant figure.

Both these methods are entirely legitimate, and it can make no difference to the State or the consumers which of them a particular company sees fit to adopt.

When a rate case arises it may be competent in the case of a company managed under the first system to base the rate upon the amount of capital stock and bonds outstanding; but this is because this amount will generally be found to be approximately equal to the company's assets. In the case of a company managed under the second plan it is necessary, to prevent confiscation of a whole or a part of the earning value of the company's physical assets, to ignore the amount of the stock and bonds outstanding and to look solely to the physical assets.

If it be contended that the basis of a valid rate under the Fourteenth Amendment is only that part of the company's assets which has been paid for out of the proceeds of stock and bonds, this contention is equivalent to an admission that it is entirely legitimate for a public service company, as against the public, to pay for all its extensions, additions, and improvements out of earnings, and then the rate must be high enough to pay for the estimated annual amount of such extensions, additions, and improvements. The consumers cannot be heard to say in one breath that the company cannot treat as part of its capital or investment the value of the physical assets which have been paid for out of surplus earnings, and in the next breath that in striking the account of earnings the company is not to be allowed a rate

sufficient to cover operating expenses, depreciation, and the annual cost of extensions, additions, and improvements. The practical result is probably much the same either way—that is to say, if a company spends $50,000 a year on extensions, it makes little or no difference whether it is permitted to charge a price high enough to cover this item, or whether this item is disallowed, but the rate is based upon the value of the extensions which have previously been defrayed from revenue. Whichever rule be adopted, it seems clear that the consumers cannot have the benefit of it without taking the burden also. If a company has lost the right, as against the public, to capitalize its extensions because they have been paid for out of earnings, it must be permitted to continue the process and be given a rate sufficient to meet the extensions of the future.

Although the actual difference in dollars and cents in any particular case would probably be small, or perhaps nothing at all, it seems clear that by far the simpler and more consistent method is to allow the company a reasonable return upon the present value of its physical assets, but nothing for annual extensions in excess of the amount needed to cover current operation, repairs, and depreciation.

It is submitted that the only rule applicable with strict justice to all cases, as well as the only rule consistent with the language of this court in the decisions from Smyth *vs.* Ames to the present time, is that the complainant is at least entitled to such a rate as will leave it a reasonable return, above the cost of operation, repairs, and depreciation, on the fair present cash value of the physical assets owned and employed by it in the business.

IV.

The Rate of Return.

It is suggested by the appellants, or some of them, that a price which allows the complainant the minimum rate of interest current in the community in question is not obnoxious to the Fourteenth Amendment.

The undersigned submits that the smallest return which can be allowed without violating the provisions of the Amendment is a rate which represents the value of money for investment in property of the kind in question in the part of the country in question.

A rate less than this deprives the company of a part of the income or annual value of its property, and to that extent is without due process of law.

This rate will vary for different sections of the country, for communities of different size, and perhaps for other reasons; but in any particular case, it ought not to be difficult to ascertain. It is what a purchaser would expect to earn if he bought the company's assets. It is the prospective profit which he would expect the company would be able to earn before he would be willing to pay a definite price for its physical assets. This sum cannot possibly be the minimum rate of interest in the community in question; for everybody knows that a gas, electric light, or other similar plant, with all the business hazards attached to it, cannot be sold on the same terms on which a mortgage upon real estate can be placed, or a market found for municipal bonds. It is possible that some part of the purchase money might be financed by loan at perhaps 5 per cent., or more or less, dependent upon the circumstances of the case; but it is idle to suppose that the whole purchase money could be procured on any such terms. The purchaser would expect to earn on that part of the money which he did not borrow certainly more than the rate at which he could borrow the other part.

In estimating the value of money for investment in the business in question, it is, we take it, the average value or cost of the total amount required. If, for instance, half of the purchase money could be borrowed at 5 per cent., and a purchaser could not be found unless he could be shown an earning capacity of 7 per cent. for the remaining half, the average rate for the whole investment would be 6 per cent.

Applied to gas companies, large or small, the figure which represents the annual value of money for that part of the investment which cannot be placed in the shape of a loan would, it is submitted, be considerably more than 6 per cent. The undersigned does not know to what extent the record in this case shows the current dividends which are paid by gas companies in the State of New York; but in other parts of the country there can be little doubt that dividends ranging all the way from 8 to 15 per cent. of a capitalization approximating the cash value of the company's physical assets is earned and paid without protest on the part of the public.

The court at circuit in this case has found that 6 per cent. should be allowed upon the whole investment of the company. As the question is one of the rate at which money can be found for investment in the business in question in the community in question at the time in question, and as the decision of this question depends upon the evidence in each particular case, it is submitted that the decision of the lower court in this particular case should not be set aside. It is submitted that this court cannot fairly say upon the record that 6 per cent. is more than the value of money for investment in the gas business in the city of New York at the present time.

Respectfully submitted by

NATHAN MATTHEWS.

OPINION

WILLCOX *et al.*, CONSTITUTING THE PUBLIC SERVICE COMMISSION OF NEW YORK, *v.* CONSOLIDATED GAS COMPANY.

CITY OF NEW YORK *v.* CONSOLIDATED GAS COMPANY OF NEW YORK.

JACKSON, ATTORNEY GENERAL OF THE STATE OF NEW YORK, *v.* CONSOLIDATED GAS COMPANY.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

Nos. 396, 397, 398. Argued November 4, 5, 6, 1908.—Decided January 4, 1909.[1]—Opinion filed January 12, 1909.

It is not a question of discretion or comity for the Federal court to take jurisdiction of a case; it is the duty of that court to take jurisdiction when properly appealed to; and it should not be criticized for so doing even though the case be one of local interest. *Cohens* v. *Virginia*, 6 Wheat. 264, 404. The right of a party plaintiff to choose the

[1] On January 4, 1909, MR. JUSTICE PECKHAM made the following announcement:

First. At the time of the consolidation, the value of the franchises of the constituent companies was fixed by them at $7,781,000 and that amount formed part of the capital of the complainant for which it

Federal court cannot be properly denied. *Re Metropolitan Receivership*, 208 U. S. 90, 110.

Rates, when fixed by legislative authority, for public service corporations, should allow a fair return upon the reasonable value of the property at the time it is being used, but the legislative act will not be

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issued stock. The consolidation was effected pursuant to the state statute and the State has never questioned the validity or fairness of the valuation. Since the consolidation the stock so issued has been dealt in up to the present time as valid stock of the consolidated company, capitalized pursuant to the statute at not more than the fair aggregate value of the property, franchises and rights of its constituent companies. The State should not now be heard to question the value of the franchises at the time of the consolidation. The method of arriving at the value of these kinds of franchises, and how they should generally be tested in the fixing of rates, are questions not now before the court and are left undecided. The case before the court is decided upon its own peculiar facts.

Second. The estimated increase in the value of these franchises as made by the trial court at the time of the commencement of this suit is only an estimate and is not based upon evidence sufficient to warrant the finding of any increase whatever over the amount agreed upon at the consolidation.

Third. The evidence leaves it in doubt whether the value of the property used by the company in its business is as great as found by the trial court after reducing the value of the franchises to the sum agreed upon at consolidation.

Fourth. But taking the value as found by the court, after reducing the value of the franchises the result gives a return of almost 5½ per cent. A reduction in the value of the real estate, plants, etc., of a small amount only would bring the return to, if not more than 6 per cent. A possible increased consumption of gas would probably increase the earning of the company without a corresponding increase of cost. Under all the circumstances the complainant has failed to make out its case with that degree of clearness necessary to warrant the interference of a court of equity before an actual and *bona fide* test has been made under the practical operation of supplying gas at the rates mentioned in the statutes.

Fifth. There is no rule as to any particular rate which any corporation subject to legislative control in the matter has a right to obtain without legislative interference. It depends upon circumstances and locality. In this particular case with reference to the risk attending the business and the locality where it is carried on, the complainant

declared invalid by the courts unless the rates are so unreasonably low that their enforcement would amount to taking the property for public use without compensation. *San Diego Land and Town Co. Cases*, 174 U. S. 739; 189 U. S. 439.

Except in very clear cases, courts should not interfere with state rate

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is entitled to a return, if it is possible, of 6 per cent upon the fair value of its property actually used in its business of supplying gas.

Sixth. There is no discrimination between the individual consumer and the city, by fixing the price of gas for the city at five cents per thousand cubic feet less than is permitted in the case of individual consumers, so far at least as the complainant is concerned. If the amount obtained from the total gas sold to the city and the individual is enough to secure the requisite return upon the property, it is all the complainant can require and the question of discrimination between city and individual is one in which the complainant can have no interest.

Seventh. The rate proposed must be with reference to the value of the property at the time when the rate takes effect. The company is entitled to the benefit of any increase in value at that time. This at least is the general rule, and if there be any exception to the rule, this case does not come within it.

Eighth. Any increased expense arising from the increased candle power of the light demanded by the statutes, was included substantially in the expenses of the year (1905) with reference to which the inquiry was made.

Ninth. The provision in the acts requiring a certain pressure is unconstitutional. The proof unquestionably shows great possible if not probable danger of explosion in the mains or other pipes, if the pressure demanded were applied to them as they now are. To eliminate such danger would require strengthening all the mains and other pipes, which would involve an expenditure of many millions of dollars upon which no return could be obtained at the rates prescribed by the acts. The provision can be separated, however, from the rest of the statute and the balance thereof made valid. The pressure must be sufficient to produce a light of the candle power mentioned in the acts.

Tenth. If the court below is right in its construction of the penalties, as to their amount, etc., such penalties are void, but are separable from the rest of the acts and the balance can be effectually carried out.

Eleventh. This is not a case for the valuation of good will. The complainant has in fact a substantial monopoly of the gas business in the city of New York and those who wish to use gas must take it from complainant. In this case, as there is no possibility of competition there should be no allowance for good will.

legislation before the legislation goes into effect. *Knoxville* v. *Water Co.*, *ante*, p. 1.

Value of the property employed being an essential element in determining whether a rate is or is not confiscatory, and being also largely a matter of opinion, where the determination of the question depends upon such value, a court of equity should hesitate to interfere by injunction to suspend the rate before it goes into operation and a fair trial has been made.

Franchises of public service corporations are property and cannot be taken or used by others without compensation, and, where a State has by legislative enactment permitted such corporations to capitalize such franchises, their value at the time of such capitalization should be included in the value of the property as an element for fixing rates; but no increased value of such franchises should be allowed.

Public service corporations, such as gas companies, are subject to the legislative right to fix rates which permit not more than a fair return on the property used.

Whether a rate yields such a fair return as not to be confiscatory depends upon circumstances, locality and risk, and no particular rate can be established for all cases.

Under all the circumstances of this case this court concurs with the court below that six per cent is a fair return on the value of property employed in supplying gas in the city of New York, and a rate yielding that return is not confiscatory.

In estimating value of franchises for the purpose of fixing rates, it is immaterial that the corporation is taxed on a greater value than that allowed if it charges its taxes as operating expenses in determining net income.

Where a public service corporation has a monopoly, such as of supplying gas in a large city, "good will" cannot be considered as an element of value of the property employed.

For purpose of fixing rates the value of property employed should be determined as of the time when the inquiry is made, and, as a general rule, the corporation is entitled to the benefit of increased value since acquisition.

Twelfth. As it may possibly be that a practical experience of the effect of the acts by actual operation under them might prevent the complainant from obtaining a fair and just return upon its property used in its business of supplying gas, the complainant, in that event, ought to have the opportunity of again presenting its case to the court. Therefore the decree is reversed with directions to dismiss the bill without prejudice.

A provision in a state statute, requiring a public service corporation to perform its service in such a manner that its entire plant would have to be rebuilt at a cost on which no return could be obtained at the rate fixed, deprives the company of its ability to secure such return and is unconstitutional and void.

Ex parte Young, 209 U. S. 123, followed as to the unconstitutionality of provisions in a state statute for penalties for violations so enormous as to be overwhelming.

Provisions in a gas rate bill for rate, pressure and penalties for violation, may be, as held in this case, separable and the unconstitutionality of the provisions as to pressure and penalties will not affect the provisions as to rate.

Provision in a gas rate act establishing one rate for the municipality and another for individual consumers is not an unreasonable classification and does not render the act unconstitutional under the equal protection clause of the Fourteenth Amendment.

Where none of the different classes of consumers complain of different rates the corporation cannot complain of such differences provided the total receipts are sufficient to yield an adequate return.

Where, as in this case, in an action brought before the rate takes effect, complainant fails to sustain the burden of clearly showing that a rate act is confiscatory, the bill should be dismissed without prejudice to right of the complainant to bring another action after the rate goes into effect if it then proves to be confiscatory.

So held in regard to the New York Eighty-Cent Gas Law.

157 Fed. Rep. 849, reversed.

THE appellee, complainant below, filed its bill May 1, 1906, in the United States Circuit Court for the Southern District of New York against the city of New York, the Attorney General of the State, the District Attorney of New York County and the Gas Commission of the State, to enjoin the enforcement of certain acts of the legislature of the State, as well as of an order made by the Gas Commission, February 23, 1906, to take effect May 1, 1906, relative to rates for gas in New York City.

Since the commencement of the suit the Gas Commission has been abolished and the Public Service Commission has been created by the legislature in its stead. The official term of Attorney General Mayer has also expired, and Attorney General Jackson, his successor, has been substituted in his place.

The ground for the relief asked for in the bill was the alleged unconstitutionality of the acts and the order, because the rates fixed were so low as to be confiscatory. Upon filing the bill a preliminary injunction was granted (146 Fed. Rep. 150), and after issue was joined the case was referred to one of the standing masters of the court to take testimony, in conformity to the practice indicated in *Railroad* v. *Tompkins*, 176 U. S. 167, 179.

A hearing was had before the master, who reported in favor of the complainant. The case then came before the Circuit Court, and, after argument, a final decree was entered, restraining defendants from enforcing the provisions of the acts and the order relating to rates or penalties. 157 Fed. Rep. 849. These various defendants, except the District Attorney, have taken separate appeals directly to this court from the decree so entered. The acts which are declared void as unconstitutional are chapter 736 of the Laws of 1905, which limits the price of gas sold to the city of New York to a sum not to exceed 75 cents per thousand cubic feet. The act also requires that the gas sold shall have a specified illuminating power, and a certain pressure at all distances from the place of manufacture. Penalties are attached to a violation of the act. The other act is chapter 125 of the Laws of 1906, limiting the prices of gas in the boroughs of Manhattan and the Bronx, to other consumers than the city of New York, to 80 cents per thousand cubic feet, with like penalties as in the act of 1905, and with the same provisions as to illuminating power and the pressure in the service mains. The order which was declared invalid was one made by the Gas Commission created under and by virtue of chapter 737 of the Laws of 1905, the order providing that the price of gas in the city should be not more than 80 cents to consumers other than the city of New York. The order had the same provisions as to illuminating power and pressure as the acts above mentioned. The master and the court below found that the 80-cent rate was so low as to amount to confiscation, and hence the acts and the order were invalid as in violation of the Federal Constitution.

Mr. Edward B. Whitney, with whom *Mr. George S. Coleman* was on the brief, for appellants Willcox *et al.*:

A simple allegation that a statute is unconstitutional is no exception to the rule that equity can only be resorted to when there is no adequate remedy at law. *Cruickshank* v. *Bidwell*, 176 U. S. 73; *Indiana Manufacturing Co.* v. *Koehne*, 188 U. S. 681, 684. The suit cannot be maintained on the ground that it prevents multiplicity of actions, since no representative consumers were made parties, as in *Ex parte Young*, 209 U. S. 123, 129. See *Richman* v. *Consolidated Gas Co.*, 114 N. Y. App. Div. 216, 224; *S. C.*, 186 N. Y. 409. A statute should never if possible be construed so as to be unconstitutional or absurd. *Oates* v. *National Bank*, 100 U. S. 244; *Grenada County* v. *Brogden*, 112 U. S. 268. Penalty laws are strictly construed. *France* v. *United States*, 164 U. S. 676, 682; *Bolles* v. *Outing Co.*, 175 U. S. 262, 265; *United States* v. *One Bay Horse*, 128 Fed. Rep. 207. The penalty clause in this act was not properly construed by the court below, but as properly construed is reasonable. *Cox* v. *Paul*, 175 N. Y. 328; *Griffin* v. *Interurban Street Railway Co.*, 179 N. Y. 438, 448-449; *S. C.*, 180 N. Y. 538; see cases cited in *In re Snow*, 120 U. S. 286; *United States* v. *Patty*, 2 Fed. Rep. 664; *Armour Packing Co.* v. *United States*, 209 U. S. 56, 77; *United States* v. *Eagan*, 30 Fed. Rep. 498; *Taft* v. *Stephens Lithographic Co.*, 38 Fed. Rep. 28; *Creeps* v. *Durden*, Cowp. 640; *Central R. R. Co.* v. *Green*, 86 Pa. St. 427. Assuming equity to have had jurisdiction, it should have been declined and the controversy remitted to the state courts.

The 75-cent rate as to the city is not an unconstitutional discrimination. On the contrary, since the 75-cent statute was passed in 1905, and under it the complainant could still earn nearly ten per cent according to the Circuit Court figures, it was valid when enacted, and therefore could not be made invalid by the passage of a subsequent law, even if the latter were unconstitutional.

Under the rule laid down in *Sweet* v. *Rechel*, 159 U. S. 380,

392 (derived from *Wellington, Petitioners*, 16 Pick. 87, 96–97, and *Talbot* v. *Hudson*, 16 Gray, 417, 422), and the test laid down in *San Diego Land Co.* v. *Jasper*, 189 U. S. 439, 441–442, as between two unimpeached and qualified expert witnesses, the valuations most favorable to defendant must be adopted; a statute cannot be declared unconstitutional upon testimony of experts or employés (see *Chicago & Grand Trunk Railway Co.* v. *Wellman*, 143 U. S. 339), unless the State admits its correctness; complainant is entitled to no higher valuations than those which it has itself fixed under oath; and items incapable of exact valuation must be put down at the minimum amount that a fair minded state court could fix. At least as to all items of capitalization over and above the actual cost of the property, the test must be this: Is it logical or equitable that the consumer should pay more cents per thousand cubic feet of the gas he burns because of the inclusion of this item?

The period to which attention must be directed is the month of May, 1906, when the suit was begun. If conditions thereafter change, the remedy is under *Smyth* v. *Ames*, 169 U. S. 466, 549–550.

The basis of valuation of the land occupied by complainant's plants should not exceed its cost to the company. Of two gas companies, long established in the same community, neither should be permitted to charge a higher rate than the other to its consumers for the sole reason that, on account of movements of population uninfluenced by either company, the site of its plant would be the more valuable if vacated and sold. The fortunate company is entitled to obtain full value of the land when sold, but meanwhile the unrealized profit does not represent profit used in the manufacture and distribution of gas; it represents wealth which the manufacture and distribution of gas keeps out of use. But if the basis of valuation is to exceed the cost of the land it should still not exceed the estimated cost of replacing it with other land capable of accomplishing the same result.

The manufacturing plants should be valued not at what it would cost to reproduce them as they stand, but at what it would cost to produce a modern construction which could do the same amount of work. The complainant is estopped from disputing in such a case as this the valuation which it has itself given to the state tax officers and investigating committee.

The complainant is not entitled to any allowance of increased value over original cost of the pipes in the streets, due to the fact that the streets have been repaved with money raised by assessments upon the consumers, complainant being excused under the state law from paying assessments.

A franchise with, is to be distinguished from a franchise without, the right to charge a minimum toll or earn a minimum dividend. *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312, belongs to the latter class (see original record in that case, pp. 33, 39, 50, 53, and brief for appellee therein). A revocable franchise is not entitled to be valued at a substantial sum. *Kingsland* v. *The Mayor*, 110 N. Y. 569, 583. The franchises claimed by complainant are either unconstitutional, or not complainant's property, or revocable immediately or upon short notice. Moreover, a franchise to build and operate, without any special contract guaranteeing a minimum rate, has no value cognizable in rate-making or condemnation proceedings except that it gives the company the valuable right to have its tangible assets valued as portions of a profitable going concern, instead of merely as a job lot of secondhand material. See *People ex rel. Metropolitan Street Railway Co.* v. *Tax Commissioners*, 174 N. Y. 417; *Brunswick Water District* v. *Maine Water Co.*, 99 Maine, 371, 375–381. Such a franchise must be construed as having been granted subject to the fixing of a reasonable maximum rate. There is an implied understanding that the tolls shall be high enough to give the company a fair return. A fair return on what? What would counsel advise a proposed purchaser about it, the day after the company opened for business? According to our contention it would be calculated upon the capital in-

vested. Moreover, the State can at any time authorize or direct the city to build its own lighting plant. If this be done, the company must drop its claim for a profit on its alleged franchise or lose all its customers. *Skaneateles Water Case*, 161 N. Y. 154; *S. C.*, 184 U. S. 354, and the *Newburyport Cases*, 168 Massachusetts, 541, 555; 103 Fed. Rep. 584; 193 U. S. 561.

The basis of the maximum rate regulation should not be a figure exceeding the capital actually invested. At the time of the granting of the franchise the implied understanding is that a reasonable return will be allowed upon the capital invested, in view of the special risk of the enterprise. If assured that the public will protect him to the extent of allowing him to make, if successful, a profit upon that investment proportionate to that risk, the investor will take it.

As to the rate of return, it has been already decided that six per cent, including an allowance for depreciation, is sufficient. *San Diego Co.* v. *Jasper*, 189 U. S. 439, 446. But it is submitted that property is not taken under the Fourteenth Amendment if the owner is allowed, over and above a proper contingent fund, a sum sufficient to cover the elements known in political economy as interest on capital and wages of superintendence; the element of insurance against the special risks of the business not being protected by the Fourteenth Amendment, but one as to which the responsibility is upon the State. Mill's Political Economy, Book I, Ch. 15, § 1; J. L. Laughlin's Elements of Political Economy, ed. 1902, pp. 202, 206; Marshall's Principles of Economy, Book VI, Ch. 6, §§ 4, 5. If complainant is entitled to six per cent upon any part of its investment, it is not so entitled as to the whole of the investment; for companies so situated could borrow in ordinary times at considerably lower rate to the extent of half the tangible property, nor is there evidence justifying the return at any particular rate upon the franchise item.

The bill should be dismissed because the experience of the other companies doing business in the same territory, as well

as of this complainant, should have been shown. If one of two companies doing business in the same territory can make a reasonable profit at the statutory rate, then that rate is constitutional as to both companies, since to apply it to that company alone would violate its rights under the Fourteenth Amendment. See *Gill Case*, 156 U. S. 657; *Cotting Case*, 183 U. S. 114. Applying the same rate to the company less well equipped would not violate its rights, although it might force reconstruction, temporarily cutting off any return. *Moeschen* v. *Tenement House Department*, 89 N. Y. App. Div. 526, 538; 179 N. Y. 325, 330; 203 U. S. 583.

Assuming that an injunction were proper in this case, it should have been conditioned upon complainant's reducing its charge for gas to whatever sum would be deemed constitutional. 1 Pomeroy's Eq. Jurispr., §§ 385–386, 389, 393; *De Walsh* v. *Braman*, 160 Illinois, 415, 420; see also *Veazie* v. *Williams*, 8 How. 134, 161; *Willard* v. *Tayloe*, 8 Wall. 557, 567; *People's Bank* v. *Marye*, 191 U. S. 272, 281, 285, and cases cited; *S. C.*, 3 Dill. 19, 34; *Farmers' Loan & Trust Co.* v. *Denver Co.*, 126 Fed. Rep. 46, 51; *Thomas* v. *Evans*, 105 N. Y. 601, 615; *Fanning* v. *Dunham*, 5 Johns. Ch. 122, 142, and cases cited; *Stanly* v. *Gadsby*, 10 Pet. 521; *Tiffany* v. *Boatman's Inst.*, 18 Wall. 375, 385; *Knoth* v. *Manhattan Railway Co.*, 109 App. Div. 802, 807, affirmed 187 N. Y. 243.

Mr. Alton B. Parker, with whom *Mr. Francis K. Pendleton* and *Mr. William P. Burr* were on the brief, for the city of New York, appellant in No. 397:

The court below erred in assigning to the franchises acquired by the appellee under the consolidation agreement a money value as part of the investment on which it is entitled to a return. It was solely on the finding by the court of a value of $12,000,000 for these franchises that the court decreed the enactments to be unconstitutional in respect of the rates fixed. Whatever monetary value might, for any purpose, be assigned to these franchises, it disappears when the rate of charge for

service is so reduced as to yield no more than a fair and reasonable return on the investment in the means employed in rendering the service; the court having found $47,831,435 as the value of the tangible assets employed by the appellee, and six per cent to be a reasonable return, and that the return the appellee would probably realize at the reduced rate would be $3,024,592.45, which is more than six per cent on the valuation so found—the court erred in adding to that valuation $12,000,000 for franchises, thus increasing the investment to $59,831,435, on which the probable return would be less than six per cent, though the return would even then be reasonable.

The court below erred in assigning to the tangible assets any value in excess of their original cost to the constituent corporations of the appellee and the cost of any additions thereto since 1884, the time of consolidation. The entire cost of the real estate employed in its business by the appellee was only $4,118,267.38 as against $11,985,435 allowed by the decree, being a difference of $7,867,167.62, which, being deducted from the total valuation of $47,831,435, would reduce that total to $39,964,268.38, on which the return of $3,024,592.45 would be more than seven per cent. Further, if the valuation for franchises be excluded, whether we take original cost to constituent corporations, or appraised valuation by the constituent corporations in 1884 for the purposes of consolidation and additions thereto since then, or even present values as found by the master and approved by the court, the result is the same; the net return of $3,024,592.45 exceeds six per centum; when the item franchises, valued by the corporations in 1884 at $7,781,000, and not separately valued by the master, but increased by the court, through a process of reasoning, to $12,000,000 is added that even then the return is over five per centum. And further, $5,555,761.63 has been unwarrantably added for reproductive cost of mains and services and deducting this sum and the excessive allowance for real estate from the total found by the court, the

return to the appellee on its investment would be more than eight per cent.

The return of six per cent adopted by the court, is more than a fair return to the appellee, that is more than is usually obtained or expected from equally safe investments.

The finding of the court as to the impossibility of the appellee fulfilling the requirement as to pressure in its mains is predicated of the erroneous valuations of the property of the appellee, and these being corrected the appellee would be able to make the requisite changes and still have a fair return; and the requirement is separable from the other provisions.

The legislation complained of is not unjustly discriminatory; the discrimination is just and reasonable, the city standing in the relation of a wholesale consumer or buyer; the cost of supplying the city is greatly less than the cost of supplying other consumers; and the difference of five cents per thousand feet in favor of the city when spread over the entire sales of the appellee results in a difference of only fifteen one-hundreths of a cent per thousand feet in favor of the city.

The appellee has an adequate defense at law against proceedings to enforce performance of any of the provisions of the statute, if they are not enforcible, and, by injunction, against the separable provisions for penalties.

Mr. William S. Jackson, Attorney General of the State of New York, for appellant in No. 398:

The evidence fails to show that it was impossible for the legislature fair-mindedly to come to the results reached.

The legislative acts were based upon evidence presented by complainant.

The legislative acts were invalidated by improper methods of valuation, involving property not entitled to a return, gross over-valuations and duplications. For purposes of rate regulation, neither franchise nor good-will can be valued separately from tangible property. The valuation of franchises and good-will would nullify the State's power to reduce rates

once established. But that power has been upheld by this court in *Stanislaus County* v. *San Joaquin C. & I. Co.*, 192 U. S. 213, 214.

The owner is entitled to a return only upon the fair value of the property necessary for the particular use. *Covington & Lexington Co.* v. *Sandford*, 164 U. S. 578. For there may "have been extravagant and needless expenditure of money" in construction; it may have been invested in a plant "unwisely built." *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U. S. 362; "it may have been invested in property that cost more than it should have cost." *San Diego L. & T. Co.* v. *National City*, 174 U. S. 739. "Great mistakes of construction, even though honest, may have been made, which unnecessarily enhance the cost; more property may have been acquired than necessary and needful for the purpose intended." *Stanislaus County* v. *San Joaquin C. & I. Co.*, 192 U. S. 201; and "reckless and unnecessary expenditures, not legitimately incurred in the acquisition, construction or preservation of so much of the plant as is necessary for the purpose, may have been made." *San Diego City Co.* v. *City of San Diego*, 62 Am. St. Rep. 273. The question of reasonableness of a rate involves the element of reasonableness both as regards the company and as regards the public. *Chicago &c. R. R.* v. *Minnesota*, 134 U. S. 450; *Turnpike Co.* v. *Sandford*, 164 U. S. 578.

The rate fixed must be just to the public as well as to the public service corporation. *San Diego Land Co.* v. *National City*, 174 U. S. 757; *San Diego Land & Town Co.* v. *Jasper*, 189 U. S. 442; *Turnpike Co.* v. *Sandford*, 164 U. S. 578; *Smyth* v. *Ames*, 169 U. S. 546.

The State has the right to secure to the public the benefits of the advancement in the particular science affected by the law, and its power so to do is not to be restricted by the employment of obsolete apparatus or the use of methods which that particular science has long since discarded. *Gill Case*, 156 U. S. 657.

The 80-cent rate will be held to yield complainant a fair

return unless it is plainly and palpably confiscatory. *Chicago &c.* v. *Wellman*, 143 U. S. 339, 444; *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U. S. 362, 391; *Smyth* v. *Ames*, 169 U. S. 466, 529; *Henderson Bridge Co.* v. *Henderson City*, 173 U. S. 592, 614, 615; *San Diego Land Co.* v. *National City*, 174 U. S. 739, 754; *San Diego Land Co.* v. *Jasper*, 189 U. S. 439; *Ball* v. *Rutland R. R. Co.*, 93 Fed. Rep. 19; *Palatka Waterworks* v. *Palatka*, 127 Fed. Rep. 161.

The maximum rate fixed by chapter 125 of the Laws of 1906, will permit complainant to earn a fair return upon the property employed by it in its gas business.

A statute which permits a public service corporation to earn a return of five and five-tenths (5.5) per cent per annum upon investment in constantly appreciating realty, in plant and property in the streets protected against depreciation, and upon intangible property, which is constantly appreciating in value, does not constitute confiscation of that property.

The provisions as to candle power, pressure and penalties do not invalidate the acts and they are separable. *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U. S. 362, 394–396; *Consolidated Gas Co.* v. *Mayer*, 146 Fed. Rep. 155.

The eleven-cent allowance by the court was excessive.

We submit that all this allowance in excess of 7.70 cents for current repairs and replacements is excessive. The 7.70-cent charge keeps the plant at all times presently efficient. The average for twenty years has been 10.89 cents, and the development of the capacity under that average shows that it was much more than necessary for the purpose now pretended. *Cedar Rapids Water Co.* v. *Cedar Rapids*, 199 U. S. 600.

Mr. James M. Beck, *Mr. John A. Garver* and *Mr. Charles F. Matthewson* for appellee:

Mr. Beck: In the statutes here in question the provisions as to pressure are unconstitutional, and invalidate both statutes. The undisputed and indisputable conclusions from the testimony upon this point are:

Assuming that compliance with the pressure provisions was at all practicable, it would involve the expenditure of at least $4,000,000, a substantial increase in operating charges and a reconstruction of the company's distributing system throughout the city; such compliance was physically impossible before the act became operative and the penalties for non-compliance accrued; nor could such increased fixed charges and operating expenses be incurred under the eighty-cent gas rate, and leave a fair return.

The penalties for failure to comply would aggregate at $5,000 per day, $1,800,000 per year under complainant's distributing system as now existing and in operation.

The subjects of price, quality and pressure are so interwoven in these statutes that the requirements as to pressure cannot be severed from the other provisions so that the court can reasonably believe that the legislature would have enacted the provisions as to price and candle power with the provision as to pressure eliminated, and this being so, the whole scheme of legislation is invalidated. The legislative history of the statutes plainly shows the interdependence of the provisions.

This court is under no obligation to determine for the legislature which of two impossible alternatives is to be eliminated. *Non constat* that the legislature may not prefer to retain the old maximum price of $1 to enable the complainant to reconstruct its plant; *non constat* that it may not prefer to repeal the provisions as to pressure in order that the price of gas may be reduced.

The cases cited by counsel for appellants upon the question of severability do not sustain their contentions. *Pollock* v. *Loan Co.*, 158 U. S. 601; *Employer's Liability Cases*, 207 U. S. 463, 501; *Field* v. *Clark*, 143 U. S. 649; *McPherson* v. *Blacker*, 146 U. S. 1; *Baldwin* v. *Franks*, 120 U. S. 685; *Huntington* v. *Worthing*, 120 U. S. 97; *Allen* v. *Louisiana*, 103 U. S. 80, discussed and distinguished.

The severability of different portions of a statute is a question of construction, and in this case a New York statute

should be construed by New York decisions under which the pressure provision is not severable from the body of the statute. See *People* v. *Porter*, 90 N. Y. 68; *Trustees Saratoga Springs* v. *Gas Co.*, 191 N. Y. 123.

The provisions of said acts as to penalties are unconstitutional on their face and invalidate both statutes. Such penalties operate as a denial of the equal protection of the laws. *Cotting* v. *Stockyards Co.*, 183 U. S. 79; *Ex parte Young*, 209 U. S. 123; *Chicago Ry. Co.* v. *Minnesota*, 134 U. S. 418.

Both statutes are unduly discriminatory, and therefore unconstitutional upon their face.

This corporation has, as every one has, the liberty of contract guaranteed by the Fourteenth Amendment. *Lochner* v. *New York*, 198 U. S. 53; *Allgeyer* v. *Louisiana*, 165 U. S. 589. The State, therefore, has no general and unlimited right to interfere between the producer and the consumer as to the price upon which they would otherwise mutually agree, and while, as to public utility corporations the supervisory power of the State, subject to the guarantees of the Constitution, has been recognized since *Munn* v. *Illinois*, yet the State, when it seeks to interfere with the rights of property and the liberty of the citizen to contract for the sale of the products of his labor, only has power to prevent extortion by maximum charges of general and uniform application.

Under the police power to regulate rates, the State is without power to direct a public utility corporation to sell to one customer at a less price than to another. Its power to step between the public service corporation and its customers is exhausted when it fixes a general and uniform maximum price for the public service. *Lake Shore R. R. Co.* v. *Smith*, 173 U. S. 684. See also *Wilson* v. *United Traction Co.*, 72 App. Div. 233; *Beardsley* v. *Railroad Co.*, 162 N. Y. 230.

The rate fixing power is one of prohibition. In strictness, it does not fix rates, but simply provides that any sum beyond a given maximum is unreasonable. In so doing, it in effect declares that the maximum is a reasonable price. *Brooklyn*

Union Gas Co. v. *New York*, 188 N. Y. 334; *Lake Shore Ry. Co.* v. *Smith*, 173 U. S. 684, 695.

When, therefore, the State provides that as to all other consumers, 80 cents per thousand feet is a reasonable charge, and provides that, as to one consumer, no greater charge than 75 cents shall be made, it in effect declares that to the favored consumer gas must be sold at less than a reasonable rate. This the State cannot do.

The finding of the Circuit Court that the rates prescribed would yield the complainant less than a just and reasonable rate of return is a finding of fact and not a conclusion of law, and this court should therefore give to such finding the controlling weight of a special verdict of a jury and not reverse such finding except for clear and indubitable error. *Turnpike Co.* v. *Kentucky*, 164 U. S. 578; *C., M. & St. P. R. R. Co.* v. *Tompkins*, 176 U. S. 167; *Davis* v. *Schwartz*, 155 U. S. 631, 636; 1 Foster's Fed. Prac., § 315, p. 690; *Green* v. *Bishop*, 1 Cliff. 186, 194; *Mason* v. *Crosby*, 3 Woodb. & Minn. 258, 269; *Donnell* v. *Columbia Ins. Co.*, 2 Sumn. 366, 371; *Welling* v. *La Bau*, 34 Fed. Rep. 40; *Moline Plow Co.* v. *Carson*, 72 Fed. Rep. 387, 388; *Fidelity &c. Co.* v. *St. Matthew's Savings Bank*, 104 Fed. Rep. 858, 860; *Paddock* v. *Commercial Ins. Co.*, 104 Massachusetts, 521, 531; *Richards* v. *Todd*, 127 Massachusetts, 167, 172; *Penna. R. R. Co.* v. *Philadelphia County*, 220 Pa. St. 100.

The Fourteenth Amendment invalidates a rate if it yield less than just remuneration, even though it yield some return. *Cotting* v. *Stockyards Co.*, 183 U. S. 91; *Railroad Commission Cases*, 116 U. S. 307; *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312, 326; *Munn* v. *Illinois* (dissenting opinion of Field, J.), 94 U. S. 141; *Chicago R. R. Co.* v. *Minnesota*, 134 U. S. 418, 458; *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U. S. 362, 397; *Smyth* v. *Ames*, 169 U. S. 466; *San Diego Land Co.* v. *National City*, 174 U. S. 739; *Minneapolis R. R. Co.* v. *Minnesota*, 186 U. S. 257; *Atlantic Coast Line R. R. Co.* v. *N. C. Corp. Com.*, 206 U. S. 1.

A composite statement of this court, therefore, is that legis-

lative rates, to be constitutional, must yield a "compensation" that is "full," "fair," "just," "reasonable" and "adequate" and one that is not less than the "market value" of such use.

The rule that the fair return must not be less than the legal rate of interest is justified on reason and authority. *Brunswick Water District* v. *Maine Water Co.*, Beale and Wyman on R. R. Rate Regulation, § 401; *Brymer* v. *Water Co.*, 179 Pa. St. 251; *Pennsylvania R. R. Co.* v. *Philadelphia County*, 220 Pa. St. 100, 115; *Chicago Union Traction Co.* v. *State*, 114 Fed. Rep. 557, 561; *Louisville Ry. Co.* v. *Brown*, 123 Fed. Rep. 946; *Central R. R. of Ga.* v. *Alabama*, 161 Fed. Rep. 925; *Milwaukee Ry. & Light Co.* v. *Milwaukee*, 87 Fed. Rep. 577; *Southern Pacific R. R. Co.* v. *Commonwealth*, 78 Fed. Rep. 236; *Spring Valley Water Works* v. *San Francisco*, 124 Fed. Rep. 598; *Bridge Co.* v. *Canada Southern Ry.*, 7 Ont. App. 226.

The basis of calculation should be the present value of the property and not its original cost. *San Diego Land Co.* v. *National City*, 174 U. S. 739, 757; *Cotting* v. *Stockyards Co.*, 183 U. S. 79, 91; *Smyth* v. *Ames*, 169 U. S. 547; *San Diego Land Co.* v. *Jasper*, 189 U. S. 439, 442; *Stanislaus County* v. *Irrigation Co.*, 192 U. S. 201, 215; *Cotting* v. *Kansas City Stockyards Co.*, 82 Fed. Rep. 850, 854.

Mr. Garver: Special franchises must be included among the assets upon which the company is entitled to a return. The special franchises which are involved in the case at bar are the identical franchises which were under consideration by this court in the Special Franchise Tax Cases. *Metropolitan Street Ry. Co.* v. *New York*, 199 U. S. 1, affirming 174 N. Y. 417; *Consolidated Gas Co.* v. *New York*, 199 U. S. 53.

The law of New York controls as to nature of special franchises. *Ohio Oil Co.* v. *Indiana*, 177 U. S. 190, 205, 207; *Muhlker* v. *Harlem R. R. Co.*, 197 U. S. 544; *Vicksburg* v. *Vicksburg Water Works Co.*, 206 U. S. 496, 509.

In New York, special franchises are property in the fullest sense. *Sixth Ave. R. Co.* v. *Kerr*, 72 N. Y. 330; *People* v. *O'Brien*,

111 N. Y. 1, 40; *Suburban Rapid Transit Co.* v. *New York*, 128 N. Y. 510, 520; *People ex rel. Woodhaven Gas Co.* v. *Deehan*, 153 N. Y. 528, 532; *Parker* v. *Elmira, C. & N. R. Co.*, 165 N. Y. 274; *People* v. *Tax Commissioners*, 174 N. Y. 417, 437; *Matter of White Plains Commissioners*, 176 N. Y. 239; *Matter of Long Acre El. L. & P. Co.*, 188 N. Y. 361; *Hatfield* v. *Straus*, 189 N. Y. 208, 219; *Coney Island &c. R. Co.* v. *Kennedy*, 15 App. Div. 588, 592; *Rochester &c. Turnpike Road Co.* v. *Joel*, 41 App. Div. 43, 45; *Wakefield* v. *Village of Theresa*, 125 App. Div. 38.

A corporation cannot be deprived of its special franchises, except under the power of eminent domain and upon payment of their full value. *Sixth Ave. R. Co.* v. *Kerr*, 72 N. Y. 330; *Matter of White Plains Commissioners*, 176 N. Y. 239; *Coney Island &c. R. Co.* v. *Kennedy*, 15 App. Div. 588, 592; *Spring Valley Water Works* v. *San Francisco*, 124 Fed. Rep. 574; *Monongahela Nav. Co.* v. *United States*, 148 U. S. 312.

While the point has not been directly passed upon by this court, yet, wherever it has been referred to in the general discussion of the subject of rate regulation, it has been stated or assumed that, in fixing a rate, the value of the special franchises must be included in valuing the property of a public service corporation. *Smyth* v. *Ames*, 169 U. S. 466; *Reagan* v. *Farmers' L. & T. Co.*, 154 U. S. 362; *Chicago &c. Ry. Co.* v. *Tompkins*, 176 U. S. 167; *Detroit* v. *Detroit Citizens' St. Ry. Co.*, 184 U. S. 368.

In addition to the fact that these franchises are regarded as "property in the highest sense," in New York there are some special considerations which would make it peculiarly flagrant for the legislature of that State to disregard them, in establishing a maximum rate for a public service corporation, and particularly for the appellee. *People* v. *O'Brien*, 111 N. Y. 1, 40.

In New York, special franchises are assessed for the purposes of taxation, under a special statute passed for that purpose. Laws 1899, Ch. 412; *People* v. *Tax Commissioners*, 174 N. Y.

417, 437. The right to capitalize special franchises has been recognized by the law of New York. Laws 1907, Ch. 429, §§ 55, 69. The capitalization of special franchises was expressly sanctioned in 1884. Laws 1884, Ch. 367.

An unconditional grant by a State constitutes a contract, which is entitled to protection under the Constitution just as fully as a grant made by an individual. *Fletcher* v. *Peck*, 6 Cranch, 87; *Sinking Fund Cases*, 99 U. S. 700, 719; *New Orleans Water Works Co.* v. *Rivers*, 115 U. S. 674, 681; *People* v. *O'Brien*, 111 N. Y. 1.

Good will should have been included among the assets upon the value of which the company was entitled to a return. Good will is a valuable property right, growing out of the successful establishment of a business, over and above the actual capital invested and employed in the business. *Franchises Tax Cases*, 174 N. Y. 417, 424; *Gue* v. *Tidewater Canal Co.*, 24 How. 261; *State R. R. Tax Cases*, 92 U. S. 575, 606; *Slater* v. *Slater*, 175 N. Y. 143; *Matter of White Plains Commissioners*, 176 N. Y. 239; *People* v. *Roberts*, 154 N. Y. 101; *Cleveland &c. Ry. Co.* v. *Backus*, 154 U. S. 439; *Express Company Cases*, 166 U. S. 171, 185; *Western Union Tel. Co.* v. *Gottlieb*, 190 U. S. 412; *Fargo* v. *Hart*, 193 U. S. 490; *San Francisco Bank* v. *Dodge*, 197 U. S. 70.

Mr. Matthewson dealt exclusively with the facts in the cases.

By leave of court, *Mr. W. Bourke Cockran*, representing certain interested parties, and *Mr. Nathan Matthews*, representing the complainant in the case of *Haverhill Gas Light Company* v. *Barker*, pending in U. S. Circuit Court for the District of Massachusetts, filed briefs herein, as *amici curiæ*.

Mr. Justice Peckham, after making the foregoing statement, delivered the opinion of the court.

At the outset it seems to us proper to notice the views regarding the action of the court below, which have been stated

by counsel for the appellants, the Public Service Commission, in their brief in this court. They assume to criticise that court for taking jurisdiction of this case, as precipitate, as if it were a question of discretion or comity, whether or not that court should have heard the case. On the contrary, there was no discretion or comity about it. When a Federal court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction (*Cohens* v. *Virginia*, 6 Wheat. 264, 404), and in taking it that court cannot be truthfully spoken of as precipitate in its conduct. That the case may be one of local interest only is entirely immaterial, so long as the parties are citizens of different States or a question is involved which by law brings the case within the jurisdiction of a Federal court. The right of a party plaintiff to choose a Federal court where there is a choice cannot be properly denied. *In re Metropolitan Railway Receivership*, 208 U. S. 90–110; *Prentis* v. *Atlantic Coast Line et al.*, 211 U. S. 210. In the latter case it was said that a plaintiff could not be forbidden to try the facts upon which his right to relief is based before a court of his own choice, if otherwise competent. It is true an application for an injunction was denied in that case because the plaintiff should in our opinion have taken the appeal allowed him by the law of Virginia while the rate of fare in litigation was still at the legislative stage, so as to make it absolutely certain that the officials of the State would try to establish and enforce an unconstitutional rule.

The case before us is not like that. It involves the constitutionality, with reference to the Federal Constitution, of two acts of the legislature of New York, and it is one over which the Circuit Court undoubtedly had jurisdiction under the act of Congress, and its action in taking and hearing the case cannot be the subject of proper criticism.

An examination of the record herein, with reference to the questions involved in the merits, shows that the act under which the Gas Commission was appointed was subsequently to the commencement and trial of this suit, declared, on grounds

not here material, to be unconstitutional by the Court of Appeals of New York. 191 N. Y. 123, February 18, 1908. The order made by the commission must therefore be regarded as invalid. It is not important in this case, because the act of the legislature of 1906, makes the same provision as to the price of gas to consumers other than the city that the order does. We have as remaining to be considered the above-mentioned two acts of the legislature.

The question arising is as to the validity of the acts limiting the rates for gas to the prices therein stated. The rule by which to determine the question is pretty well established in this court. The rates must be plainly unreasonable to the extent that their enforcement would be equivalent to the taking of property for public use without such compensation as under the circumstances is just both to the owner and the public. There must be a fair return upon the reasonable value of the property at the time it is being used for the public. *San Diego Land & Town Company* v. *National City*, 174 U. S. 739, 757; *Same* v. *Jasper*, 189 U. S. 439, 442.

Many of the cases are cited in *Knoxville* v. *Water Co.*, just decided, *ante*, p. 1. The case must be a clear one before the courts ought to be asked to interfere with state legislation upon the subject of rates, especially before there has been any actual experience of the practical result of such rates. In this case the rates have not been enforced as yet, because the bill herein was filed and an injunction obtained restraining their enforcement before they came into actual operation.

In order to determine the rate of return upon the reasonable value of the property at the time it is being used for the public, it, of course, becomes necessary to ascertain what that value is. A very great amount of evidence was taken before the master upon that subject, which is included in five large volumes of the record. Valuations by expert witnesses were given as to the value of the real estate owned by the complainant, and as to the value of the mains, service pipes, plants, meters and miscellaneous personal property.

The value of real estate and plant is to a considerable extent matter of opinion, and the same may be said of personal estate when not based upon the actual cost of material and construction. Deterioration of the value of the plant, mains, and pipes is also to some extent based upon opinion. All these matters make questions of value somewhat uncertain; while added to this is an alleged prospective loss of income from a reduced rate, a matter also of much uncertainty, depending upon the extent of the reduction and the probable increased consumption, and we have a problem as to the character of a rate which is difficult to answer without a practical test from actual operation of the rate. Of course, there may be cases where the rate is so low, upon any reasonable basis of valuation, that there can be no just doubt as to its confiscatory nature, and in that event there should be no hesitation in so deciding and in enjoining its enforcement without waiting for the damage which must inevitably accompany the operation of the business under the objectionable rate. But where the rate complained of shows in any event a very narrow line of division between possible confiscation and proper regulation, as based upon the value of the property found by the court below, and the division depends upon opinions as to value, which differ considerably among the witnesses, and also upon the results in the future of operating under the rate objected to, so that the material fact of value is left in much doubt, a court of equity ought not to interfere by injunction before a fair trial has been made of continuing the business under that rate, and thus eliminating, as far as is possible, the doubt arising from opinions as opposed to facts.

A short history of the complainant, as to its incorporation and its capital, and the method by which the value of its franchises was arrived at, will render the further examination of the case more intelligible.

Prior to 1884 there were seven gaslight companies in New York City, each operated under separate charters, granted at different times between the years 1823 and 1865 or 1871. They

each had the right to use the streets of certain portions of the city for the purpose of laying their mains and service pipes in order to furnish gas to the city and the citizens. Not one of the companies had ever been called upon to pay a penny for such right, but the grant to each was in that aspect a gratuity. It was not, at the time of granting franchises such as these, the custom to pay for them.

In 1884, by chapter 367 of the laws of that year, authority to consolidate manufacturing corporations was granted upon conditions mentioned in the act. The directors of the corporations proposing to consolidate were to make an agreement for consolidation, embracing, among other things, the amount of capital and the number of shares of stock into which it should be divided, the capital not to be in amount more "than the fair aggregate value of the property, franchises and rights of the several companies to be consolidated." The agreement was not to be valid until submitted to the stockholders of each of the companies and approved by two-thirds of each. The constituent companies, which were afterwards consolidated under their agreement, and pursuant to the act mentioned, were six in number, the seventh, the Mutual Company, withdrawing. The companies agreed upon the valuation of their property, which was to be paid for in the stock of the consolidated company, and the original stock held by the stockholders of each company was surrendered to the consolidated company. The value of the franchises of all the companies was set at the figure of $7,781,000. The court below said that the master reported there was little direct evidence before him as to the value of the franchises, to which the court added that if the master, by direct evidence, meant testimony of the same kind regarding their value as had been offered regarding every item of tangible property, there was none at all.

The court further stated "that it does not appear in the evidence how the valuation of the franchises was measured, or why the figures selected were chosen, but that it was true that when complainant was organized, in 1884, under the consolida-

tion statute, which in terms permitted it to acquire the property and franchises of the other companies, it issued stock of the par value of $7,781,000, representing the franchises it then acquired and nothing else, and that the stock was held by purchasers, who, I am compelled to think, had a right to rely upon legal protection for legally issued stock." It is not, of course, contended there was special stock issued for this particular item, but it was included in the total sum for which the consolidated company issued its stock and upon its receipt the stockholders in the various companies surrendered their stock in those companies. The result was that the amount of the stock issued by the consolidated company was increased by $7,781,000, representing a value of franchises which was agreed upon by the stockholders in the companies, and which had never cost any of them a single penny.

It cannot be disputed that franchises of this nature are property and cannot be taken or used by others without compensation. *Monongahela Co.* v. *United States*, 148 U. S. 312; *People* v. *O'Brien*, 111 N. Y. 1, and cases cited. The important question is always one of value. Taking their value in this case as arrived at by agreement of their owners, at the time of the consolidation, that value has been increased by the finding of the court below to the sum of $12,000,000 at the time of the commencement of this suit. The trial court said: "If, however, complainant's franchises were worth $7,781,000 in 1884, and its tangible property, at the same time, was appraised (as appears in evidence), at $30,000,000 (in round figures), then since complainant's business (in sales volume) has, in twenty-three years, almost quadrupled, and its tangible assets grown to $47,000,000, it appears to me that a fair method of fixing value of the franchises in 1905 is to assume the same growth in value for the franchises as is demonstrated by the evidence in the case of tangible property. If, therefore, the franchise valuation of 1884 was proportioned to personalty and realty of $30,000,000, a franchise valuation proportioned to $47,000,000 in 1905 would be over $12,000,000. This, I think, a logical re-

sult from the assumption I am compelled to start with, *i. e.*, that franchises have a separate and independent value. But there is, however, no method of valuing franchises, except by a consideration of earnings; earnings must be proportioned to assets; and both kinds of assets, tangible and intangible, must stand upon the same plane of valuation; having, therefore, a measure of growth of tangible assets from 1884 to 1905, the franchise assets must be assumed to have grown in the same proportion. I find that the value of complainant's franchises at the date of inquiry was not less than $12,000,000, making a total valuation of $59,000,000, upon which the probable return is $3,030,000, or very considerably less than 6 per cent." The judge stated his own views as opposed to including these franchises in the property upon the value of which a return is to be calculated in fixing the amount of rates, but held that he was bound by decided cases to hold against his personal views.

We are not prepared to hold with the court below as to the increased value which it attributes to the franchises. It is not only too much a matter of pure speculation, but we think it is also opposed to the principle upon which such valuation should be made. This corporation is one of that class which is subject to regulation by the legislature in the matter of rates, provided they are not made so low as to be confiscatory. The franchises granted the various companies and held by complainant consisted in the right to open the streets of the city and lay down mains and use them to supply gas, subject to the legislative right to so regulate the price for the gas as to permit not more than a fair return (regard being had to the risk of the business) upon the reasonable value of the property at the time it is being used for the public.

The evidence shows that from their creation, down to the consolidation in 1884, these companies had been free from legislative regulation upon the amount of the rates to be charged for gas. They had been most prosperous and had divided very large earnings in the shape of dividends to their stockholders, dividends which are characterized by the Senate committee,

appointed in 1885 to investigate the facts surrounding the consolidation, as enormous. The report of that committee shows that several of the companies had averaged, from their creation, dividends over sixteen per cent, and the six companies in the year 1884 paid a dividend upon capital which had been increased by earnings, as in the case of the Manhattan and the New York, of eighteen per cent, and, had it been upon the money actually paid in, it would have been nearly twenty-five per cent.

The committee also said in the same report that these "franchises were in force November 10, 1884, the time of the consolidation, and the money invested in them was earning the same enormous dividends. So far as the evidence shows, there was nothing in the condition of affairs on the 10th of November to indicate that these franchises would not be as valuable for the next twenty years as they had been in the past. There were gas companies enough in the city with a capacity capable of supplying the demands for the next twenty years. A law was on our statute books that virtually prohibited the laying of any more gas pipes in the streets. The gas companies had an agreement among themselves, fixing the price of gas at a figure that paid these dividends. The people were paying this price, as they had in the past, without objection or protest. This price may have been too high, and the dividends were excessive, but they were not illegal, and the valuation of the franchises computed upon these dividends, and that state of facts cannot be called a violation of a law that expressly authorized it to be done, unless such valuation was too high."

The committee, upon these facts, were of opinion that the valuation of $7,781,000 for the franchises was not more than their fair aggregate value.

Assuming, as the committee did, that the company would be permitted to charge the same prices in the future which in the past had resulted in these "enormous" or "excessive" dividends, it need not be matter of surprise that a franchise by

means of which such dividends had been possible was not regarded as overvalued at the sum stated in 1884.

We think that under the above facts the courts ought to accept the valuation of the franchises fixed and agreed upon under the act of 1884 as conclusive at that time. The valuation was provided for in the act, which was followed by the companies, and the agreement regarding it has been always recognized as valid, and the stock has been largely dealt in for more than twenty years past on the basis of the validity of the valuation and of the stock issued by the company.

But although the State ought, for these reasons, to be bound to recognize the value agreed upon in 1884 as part of the property upon which a reasonable return can be demanded, we do not think an increase in that valuation ought to be allowed upon the theory suggested by the court below. Because the amount of gas supplied has increased to the extent stated, and the other and tangible property of the corporations has increased so largely in value, is not, as it seems to us, any reason for attributing a like proportional increase in the value of the franchises. Real estate may have increased in value very largely, as also the personal property, without any necessary increase in the value of the franchises. Its past value was founded upon the opportunity of obtaining these enormous and excessive returns upon the property of the company, without legislative interference with the price for the supply of gas, but that immunity for the future was, of course, uncertain, and the moment it ceased and the legislature reduced the earnings to a reasonable sum the great value of the franchises would be at once and unfavorably affected, but how much so it is not possible for us now to see. The value would most certainly not increase. The question of the regulation of rates did from time to time thereafter arise in the legislature, and finally culminated in these acts which were in existence when the court below found this increased value of the franchises. We cannot, in any view of the case, concur in that finding.

This increase in value did, however, form part of the sum upon which the court below held the complainant was entitled to a return. That court found the value of the tangible assets actually employed at the time of the commencement of this suit in the business of supplying gas by the complainant to be $47,831,435, to which it added the $12,000,000 as the value of the franchises as found by it, making the total of $59,831,435, upon which it held that the company was entitled to a return of 6 per cent, being $3,589,886.10. It also found its total net income for the year 1905 amounted to $5,881,192.45, almost 10 per cent upon the sum above named. Altering the finding of the court so far only as to place the value of the franchises at the time agreed upon in 1884, $7,781,000, the total value upon that basis of the property employed by the company would be $55,612,435, upon which 6 per cent would be $3,336,746.10, while the sum, estimated as the return on 80 cent gas would have been $3,024,592.14, which is nearly 5½ per cent on the above total of $55,612,435.

What has been said herein regarding the value of the franchises in this case has been necessarily founded upon its own peculiar facts, and the decision thereon can form no precedent in regard to the valuation of franchises generally, where the facts are not similar to those in the case before us. We simply accept the sum named as the value under the circumstances stated.

There is no particular rate of compensation which must in all cases and in all parts of the country be regarded as sufficient for capital invested in business enterprises. Such compensation must depend greatly upon circumstances and locality; among other things, the amount of risk in the business is a most important factor, as well as the locality where the business is conducted and the rate expected and usually realized there upon investments of a somewhat similar nature with regard to the risk attending them. There may be other matters which in some cases might also be properly taken into account in determining the rate which an investor might properly expect

or hope to receive and which he would be entitled to without legislative interference. The less risk, the less right to any unusual returns upon the investments. One who invests his money in a business of a somewhat hazardous character is very properly held to have the right to a larger return without legislative interference, than can be obtained from an investment in Government bonds or other perfectly safe security. The man that invested in gas stock in 1823 had a right to look for and obtain, if possible, a much greater rate upon his investment than he who invested in such property in the city of New York years after the risk and danger involved had been almost entirely eliminated.

In an investment in a gas company, such as complainant's, the risk is reduced almost to a minimum. It is a corporation, which in fact, as the court below remarks, monopolizes the gas service of the largest city in America, and is secure against competition under the circumstances in which it is placed, because it is a proposition almost unthinkable that the city of New York would, for purposes of making competition, permit the streets of the city to be again torn up in order to allow the mains of another company to be laid all through them to supply gas which the present company can adequately supply. And, so far as it is given us to look into the future, it seems as certain as anything of such a nature can be, that the demand for gas will increase, and, at the reduced price, increase to a considerable extent. An interest in such a business is as near a safe and secure investment as can be imagined with regard to any private manufacturing business, although it is recognized at the same time that there is a possible element of risk, even in such a business. The court below regarded it as the most favorably situated gas business in America, and added that all gas business is inherently subject to many of the vicissitudes of manufacturing. Under the circumstances, the court held that a rate which would permit a return of six per cent would be enough to avoid the charge of confiscation, and for the reason that a return of such an amount was the return ordinarily

sought and obtained on investments of that degree of safety in the city of New York.

Taking all facts into consideration, we concur with the court below on this question, and think complainant is entitled to six per cent on the fair value of its property devoted to the public use. But assuming that the company is entitled to six per cent upon the value of its property actually used for the public, the total value fixed by the court below is, as we have seen, much too large. We must first strike out the increased value of the franchises asserted by the court over the amount agreed upon in 1884, when the companies were consolidated. We also find that the total value of the tangible property is made up of several items, two of which are—

Real estate	$11,985,435
Plants	15,000,000

Both depend largely upon the opinions of expert witnesses as to the value of that kind of property. Where a large amount of the total value of a mass of different properties consists in the value of real estate, which is only ascertained by the varying opinions of expert witnesses, and where the opinions of the plaintiffs' witnesses differ quite radically from those of the defendants', it is apparent that the total value must necessarily be more or less in doubt. It, in other words, becomes matter of speculation or conjecture to a great extent. It may be, as already suggested, that in many cases the rates objected to might be so low that there could be no reasonable doubt of their inadequacy upon any fair estimate of the value of the property. In such event the enforcement of the rates should be enjoined even in a case where the value of the property depends upon the value to be assigned to real estate by the evidence of experts. But there may be other cases where the evidence as to the probable result of the rates in controversy would show they were so nearly adequate that nothing but a practical test could satisfy the doubt as to their sufficiency.

In this case a slight reduction in the estimated value of the real estate, plants and mains, as given by the witnesses for

complainant, would give a six per cent return upon the total value of the property as above stated. And again, increased consumption at the lower rate might result in increased earnings, as the cost of furnishing the gas would not increase in proportion to the increased amount of gas furnished.

The elevated railroads in New York when first built charged ten cents for each passenger, but when the rate was reduced to five cents it is common knowledge that their receipts were not cut in two, but that from increased patronage the earnings increased from year to year, and soon surpassed the highest sum ever received upon the ten cent rate.

Of course, there is always a point below which a rate could not be reduced and at the same time permit the proper return on the value of the property, but it is equally true that a reduction in rates will not always reduce the net earnings, but on the contrary may increase them. The question of how much an increased consumption under a less rate will increase the earnings of complainant, if at all, at a cost not proportioned to the former cost, can be answered only by a practical test. In such a case as this, where the other data upon which the computation of the rate of return must be based, are from the evidence so uncertain, and where the margin between possible confiscation and valid regulation is so narrow we cannot say there is no fair or just doubt about the truth of the allegation that the rates are insufficient.

The complainant also contends that the State having taxed it upon its franchises cannot be heard to deny their existence or their value as taxed.

The fact that the State has taxed the company upon its franchises at a greater value than is awarded them here, is not material. Those taxes, even if founded upon an erroneous valuation, were properly treated by the company as part of its operating expenses, to be paid out of its earnings before the net amount could be arrived at applicable to dividends, and if such latter sums were not sufficient to permit the proper return on the property used by the company for the public,

then the rate would be inadequate. The future assessment of the value of the franchises, it is presumed, will be much lessened if it is seen that the great profits upon which that value was based are largely reduced by legislative action. In that way the consumer will be benefited by paying a reduced sum (although indirectly) for taxes.

We are also of opinion that it is not a case for a valuation of "good will." The master combined the franchise value with that of good will, and estimated the total value at $20,000,000.

The complainant has a monoply in fact, and a consumer must take gas from it or go without. He will resort to the "old stand," because he cannot get gas anywhere else. The court below excluded that item, and we concur in that action.

And we concur with the court below in holding that the value of the property is to be determined as of the time when the inquiry is made regarding the rates. If the property, which legally enters into the consideration of the question of rates, has increased in value since it was acquired, the company is entitled to the benefit of such increase. This is, at any rate, the general rule. We do not say there may not possibly be an exception to it, where the property may have increased so enormously in value as to render a rate permitting a reasonable return upon such increased value unjust to the public. How such facts should be treated is not a question now before us, as this case does not present it. We refer to the matter only for the purpose of stating that the decision herein does not prevent an inquiry into the question when, if ever, it should be necessarily presented.

The matter of the increased cost of the gas, resulting from the provisions of the acts, as to making the gas equal to 22 candle-power, is also alleged as a reason for inadequacy of rate.

It appears that the average candle-power actually produced in the first six months of the year 1905 was 22, while but 20 candle-power was exacted by law, and for the last six months of that year, while 22 candle-power was exacted, the average

amount was 24.19. This expense was included in the operating expense of that year, which resulted in the net earnings above mentioned, while the company was complying with the requirements of the act in this particular.

It is unnecessary, therefore, to further inquire as to the additional expense caused by this requirement.

Again, it has been asserted that the laws are unconstitutional, because of the provision as to pressure, and also by reason of the penalties which a violation of the acts may render a corporation liable to.

The acts provide that the pressure of the gas in the service mains at any distance from the place of manufacture shall not be less than one inch nor more than two and a half inches.

The evidence shows that to put a pressure such as is demanded by the acts upon the mains and other service pipes in their present condition would be to run a great risk of explosion, and consequent disaster. Before compliance with this provision would be safe the mains and other pipes would have to be strengthened throughout their whole extent, and at an expenditure of many millions of dollars, from which no return could be obtained at the rates provided in the acts. This would take from the complainant the ability to secure the return to which it is entitled upon its property, used for supplying gas, and the provision as to the amount of pressure is therefore void. This particular duty imposed by the acts is, however, clearly separable from the enactments as to rates, and we have no doubt that the remainder of the statute would have been enacted, even with that provision omitted.

The obligation would remain upon the company to have a pressure sufficient to insure a light of 22 candle-power, as provided in the acts.

We are of the same opinion as to the penalties provided for a violation of the acts. They are not a necessary or inseparable part of the acts, without which they would not have been passed. If these provisions as to penalties have been properly construed by the court below, they are undoubtedly void,

within the principle decided in *Ex parte Young*, 209 U. S. 123, and the cases there cited, because so enormous and overwhelming in their amount.

When the objectionable part of a statute is eliminated, if the balance is valid and capable of being carried out, and if the court can conclude it would have been enacted if that portion which is illegal had been omitted, the remainder of the statute thus treated is good. *Reagan* v. *Trust Co.*, 154 U. S. 362, 395; *Berea College* v. *Commonwealth of Kentucky*, 211 U. S. 45, 54. This is a familiar principle.

Lastly, it is objected that there is an illegal discrimination as between the city and the consumers individually. We see no discrimination which is illegal or for which good reasons could not be given. But neither the city nor the consumers are finding any fault with it, and the only interest of the complainant in the question is to find out whether, by the reduced price to the city, the complainant is upon the whole unable to realize a return sufficient to comply with what it has the right to demand. What we have already said applies to the facts now in question.

We cannot see from the whole evidence that the price fixed for gas supplied to the city by the wholesale, so to speak, would so reduce the profits from the total of the gas supplied as to thereby render such total profits insufficient as a return upon the property used by the complainant. So long as the total is enough to furnish such return it is not important that with relation to some customers the price is not enough. *Minneapolis &c.* v. *Minnesota*, 186 U. S. 257; *Atlantic Coast Line* v. *North Carolina Commission*, 206 U. S. 1.

Upon a careful consideration of the case before us we are of opinion that the complainant has failed to sustain the burden cast upon it of showing beyond any just or fair doubt that the acts of the legislature of the State of New York are in fact confiscatory.

It may possibly be, however, that a practical experience of the effect of the acts by actual operation under them might